

See No Evil?

- Procedural Transparency in International Investment Law and Dispute Settlement.

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1 Introduction

1.1 Object and Purpose

The aim of this thesis is to address the extent and particulars of the regulation of procedural transparency¹ in treaty-based investor-state dispute settlement. I will investigate the development that has taken place in states' approach to treaty design and in the relevant arbitral regimes with regard to the transparency of investor-state dispute settlement. To what extent are "transparency and accountability ... beginning to outweigh privacy and confidentiality in importance" in investment arbitration?² In order to answer this and related questions, it is essential to analyse decisions of arbitral tribunals pertaining to procedural transparency, as these provide interpretations of the procedural rules relevant to transparency, as well as illustrating the degree of interplay between treaties, applicable procedural rules and the powers of arbitral tribunals to determine issues of procedure, including issues pertaining to transparency and confidentiality. I will attempt to present a hopefully representative overview of the extent and characteristics of transparency regulation in investment treaties, the approach of arbitral tribunals when exercising procedural discretion on the most central issues, as well as point to possible future developments with regard to treaty design and tribunal attitudes to transparency in arbitration proceedings.

Underlying the debate on transparency in investment arbitration is the question of whether investment disputes, as disputes between private investors and sovereign states, are deserving of more transparent proceedings than what has been the practice in traditionally private

¹ As opposed to *regulatory transparency*, which focuses on the transparency of national regulatory and administrative systems. Regulatory transparency has also received considerable attention in investment law debate and practice, often in connection with the interpretation of treaty standards providing "fair and equitable treatment". See, e.g. Kotera (2008) pp. 617–636. Regulatory transparency is quite distinct from procedural transparency and considerations on the issue lay outside the scope of this thesis. When I refer to "transparency" in the following, this must be taken as a reference to procedural transparency.

² McLachlan, Shore and Weiniger (2007) p. 57.

commercial arbitration, on which the investment arbitration system is modelled.³ Generally speaking, claims submitted to investment arbitration are based on an alleged breach of the rights vested in an investor by an investment treaty, while claims subject to conventional commercial arbitration, usually between private parties, are based on breach of contract.⁴ The former category of disputes involves a tension between treaty standards of protection and the regulatory powers of sovereign states under municipal law.⁵ This tension is resolved by investment tribunals, by the “review of sovereign acts through the lens of international law, [which] often raises issues of public interest.”⁶ Furthermore, the subject matter of individual disputes commonly involves matters concerning public interests. In addition, should a state lose a dispute, it will potentially have to pay considerable damages to the aggrieved investor, which raises the issue of state finances and expenditures.⁷ These are all concerns which have been furthered in favour of increasing the transparency of investment arbitration.⁸ In the words of one scholar: “[A] system that curtails democratic principles – by, for example, removing issues that directly affect citizens to a system that is inaccessible and structurally isolated from public input – creates a democratic deficit.”⁹ Increased transparency has the potential to decrease this deficit.

Before continuing, a few remarks should be made with regard to the placement of the issue of transparency in the greater context of the debate on the legitimacy of the investment arbitration system as such. As arbitration under investment disputes became far more fre-

³ Mistelis (2005) pp. 205–206; Teitelbaum (2010) p. 54.

⁴ Sornarajah (2010) p. 307. For an extensive work on the settlement of contract based investor-state disputes through the parallel processes of treaty and commercial arbitration, see Alvik (2011).

⁵ Spears (2010) pp. 1037–1038.

⁶ Blackaby and Richard (2010) p. 254.

⁷ The largest reported award in the history of investment treaty arbitration was given in *Occidental v Ecuador*, in which the Claimant was awarded more than 1.7 billion USD. See *Occidental v Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 20 September 2012.

⁸ See e.g., Brown (2011) p. 13–14; Levine (2011) p. 205–206.

⁹ Choudhury (2008) p. 784.

quent in the 1990s,¹⁰ and the 2001 Argentinian economic crisis resulted in a number of highly contested investment treaty claims being brought against Argentina,¹¹ the system came under increasing criticism. In what some have termed a backlash,¹² the system has been criticized on a number of points. Some have argued that the investment arbitration system is biased in favour of investors and ill-suited in its current form to deal with what is in effect regulatory disputes involving matters of public law and interests.¹³ Others have pointed out the lack of consistency in decision-making, and its consequences for the predictability and legitimacy of the system.¹⁴ Yet others have emphasized the problem of “broad and open ended”¹⁵ investment treaty standards being interpreted to impose obligations and restrictions beyond the intention of treaty parties.¹⁶

The debate concerning the place of transparency and inclusiveness in investment arbitration should be approached with this greater context of multifaceted legitimacy-based criticism in mind. Nevertheless, procedural transparency may be investigated independently. The issue of the legitimacy of investment law system is a much broader one, drawing on a plethora of topics, and increased transparency will hardly be sufficient to “save” a system otherwise perceived as illegitimate. Consequently, transparency is at best a necessary condition for a legitimate system. But this does not hide the fact that transparency is also a

¹⁰ Dolzer and Schreuer (2012) p. 11.

¹¹ For a background on the crisis and its significance for investment law, see Brown (2011) p. 1–4, with extensive references to case law.

¹² Waibel, et al. (2011) p. xxxvii.

¹³ See, e.g. Gus Van Harten’s concept of “the businessman’s court, cf. Van Harten (2007), pp. 152–184; Burke-White and von Staden (2010) pp. 689–720. Kulick (2012) views investment law as a system of global administrative law and argues for the greater role of public interest considerations in investment treaties and dispute settlement.

¹⁴ Franck (2005) pp. 1521–1626.

¹⁵ Montt (2009) p. 127.

¹⁶ Sornarajah (2011) p. 632.

thing unto itself, and may be examined as such. It has an “inherent value”¹⁷ worth addressing.

1.2 The Concept of Transparency

The concept of *transparency* is somewhat opaque and hard to pin down. It elicits notions of information flows, access and openness systems of decision-making and process, and as such may be aptly, though roughly, described as “the generation and dissemination of information”¹⁸ concerning a given regime. Adapting *Chayes, Chayes and Mitchell’s* definition of transparency in single-treaty systems¹⁹ to the investment arbitration context, Julie Maupin provides that:

‘[T]ransparency means ‘the adequacy, accuracy, availability, and accessibility of knowledge and information about the policies and activities of [the international investment law regimes and its participants], and of the central organizations [functioning within] it on matters relevant to compliance and effectiveness, and about the operation of the norms rules, and procedures [underlying the regime].’²⁰

This conception of transparency provides a useful starting point, or framework, for addressing the practical questions and problems of procedural transparency in investment arbitration. As is often the case in international regimes, the practical impact of transparency in investment arbitration “remains elusive”.²¹ This elusiveness calls for an assessment of the

¹⁷ Maupin (2013) p. 150.

¹⁸ Chayes and Chayes (1995) p. 22.

¹⁹ Chayes, Chayes and Mitchell (1998) p. 43.

²⁰ Maupin 2013, p. 149. Maupin’s adaptations of Chayes, Chayes and Mitchell’s definition indicated in brackets.

²¹ Mitchell (1998) p. 111.

transparency of the system. The primary questions become whether and in what ways investor-state dispute settlement mechanisms provide for adequate, accurate, available and accessible knowledge and information about arbitral proceedings and the subject matter of investment disputes. In practice, these are usually framed as questions of “document transparency”, i.e. questions pertaining to public availability of and access to different types of documents produced during proceedings, and the related question of the extent and form of access to information pertaining to ongoing disputes. One often sees a division into several categories of documents, the most central being documents containing information on the initiation of arbitral proceedings, pleadings and submissions of the parties, minutes and transcripts of hearings and the decisions, orders and awards of tribunals.²²

Furthermore, the application of the above definition may be supplemented with perspectives on the related concepts of “openness”²³ and “inclusiveness”.²⁴ The former encompasses both issues of public access to information and issues of non-party participation,²⁵ while the latter typically refers to the status and interests of non-parties with regards to partaking in a dispute, by having the opportunity to attend hearings or in some way present their views.²⁶ Some aspects of these concepts, such as physical access to arbitral hearings, seem to fall within the transparency definition adopted above (as access to proceedings would entail access to information). However, the notable and much discussed issue of *amicus curiae* participation in investment arbitration proceedings does not. Consequently, for the present purposes, and based on the way the discussion on procedural transparency in investment arbitration has been framed to include elements of third-party participation – as

²² See, e.g., the division by the Tribunal in *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 3, 27 January 2010 (hereinafter “*Abaclat*, Procedural Order 3”), paragraph 153.

²³ See e.g. Van Harten (2007) pp. 159–164; Rubins (2006) p. 3.

²⁴ Asteriti and Tams (2010), p. 787.

²⁵ Van Harten (2007), p. 159.

²⁶ Asteriti and Tams (2010), 787. See also Rubins 2006, pp. 2–3.

demonstrated by how closely related the issues appear in much scholarly commentary²⁷ and tribunal case law²⁸ – the conception of transparency applied herein will include perspectives on participation in investment arbitration, first and foremost questions pertaining to *amicus curiae* participation.

However, it would go beyond the scope and size of this study to address the full range of issues raised in connection with *amicus curiae* participation, many of which have also been extensively discussed (sometimes even overshadowing more general transparency issues). Maupin makes the important observation that “the debate over the appropriate form and content of transparency norms within international investment law cannot be reduced to the parallel debate over *amicus curiae* participation in investor state arbitration proceedings”.²⁹ For the present purposes, amicus participation will be addressed primarily with regard to whether the issue is regulated in investment treaties, and with regard to questions pertaining to the rights of *amicus curiae* to access procedural documents.

A further delimitation should be accounted for. In the following, I will not address transparency issues pertaining to non-disputing state parties, as a thorough analysis on this point would prove to extensive for the size and scope of this study. A notable number of investment treaties contain provisions granting the non-disputing state party to the treaty access

²⁷See e.g. Magraw, Plagakis and Schifano (2008); Bernasconi-Osterwalder (2011); Atik (2004); VanDuzer (2007); Sureda (2012) p. 127.

²⁸ See e.g. the seminal decision by the NAFTA Chapter 11 Tribunal in the *Methanex* case on its authority under UNCITRAL Arbitration Rules to allow for *amicus curiae* submissions from non-disputing parties. See *Methanex Corporation v United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘*Amici Curiae*’, 15 January 2001 (hereinafter *Methanex*, Decision on *Amici Curiae*). See also the similar decision of the ICSID Tribunal in the *Suez-Vivendi* case. See *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v The Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005 (hereinafter “*Suez-Vivendi*, Order on *Amicus*”). See section 3.5.

²⁹ Maupin (2013) p. 149.

to information and to submit briefs on issues of interpretation of the treaty. However, issues pertaining to the transparency rights of non-disputing state parties are of a somewhat different character, and raises at least partially different questions than transparency with regard to the public and non-state third parties.³⁰ Provisions are aimed at the treaty states, not the general public, and primarily concern the relationship between the disputing parties, the non-disputing party and the tribunal, typically with regard to questions of interpretation related to material standards of protection.³¹ In this context, transparency in relation to the general public and other non-state stakeholders is rarely a notable concern.

1.3 Actors and Interests

The issue of transparency in investment arbitration should be approached with the interests of relevant actors and stakeholders in mind. The role of the public interest in investor-state disputes can be approached from several angles: There may be a “specific interest in the measure that is challenged in the case; general interest in the appropriate functioning of the investment protections; interest in the domestic law analogues of the treaty provision invoked; interest in the appropriate interaction between federal, state and local government authorities; and many others.”³² The specific interests can be addressed in relation to the potential actors and stakeholders in the system. Investment disputes raise issues of public interest and there is a danger of the legitimacy of investment arbitration being “put at risk if genuine stakeholders cannot participate in decisions affecting their rights and interests.”³³ At the very least, stakeholders may have legitimate claims with regard to transparency.

³⁰ See Kaufmann-Kohler (2013) pp. 307–326.

³¹ On the issue of non-disputing state party participation in the context of the North American Free Trade Agreement (“NAFTA”) and the Central America–Dominican Republic–United States Free Trade Agreement (“CAFTA–DR”), see Cate (2011).

³² Legum (1998) p. 144.

³³ Buckley and Blyschak (2007) p. 354.

There are several actors with a potential stake in investment disputes.³⁴ The nature of these actors and their interests will be addressed in this section.

The disputing parties have a clear interest in the level of transparency of the proceedings. Whether or not they would favour transparent proceedings or would prefer to keep all or parts of the proceedings confidential depends on the circumstances of the case in question, and is not necessarily determined by whether the party is an investor or a state. An investor will always have a strong and legitimate interest in protecting business-related and other sensitive information from being disclosed. In order to properly protect such informations, even fully transparent arbitral proceedings will provide mechanisms for the non-disclosure or redaction of confidential information, but the argument could be made that blanket confidentiality upon the proceedings will ease the logistics of safeguarding this information. Moreover, an investor would be likely to insist on confidentiality when there is fear of damage to the public image of the investor or the investment. Both parties to a dispute would likely be interested in avoiding negative publicity in general, and if public light on the details of the case and the proceedings is expected to lead to critical attention, the parties will probably choose to keep the details of the proceedings as confidential as possible. The parties may also fear that public discussion will lead to an escalation of the dispute, deteriorate the relationship between the parties or generally complicate the resolution of the case before the tribunal. Such fear is likely to lead to less transparent proceedings, at least to the extent that the parties share the anxiety.

Expressing the guiding principle of party autonomy in arbitration,³⁵ all the arbitration frameworks subject to this study provide the parties with the authority to determine issues

³⁴ On the investment law regime as on the one hand comprising a collection of political stakeholders and on the other constituting a “particularized epistemic community”, see Maupin 2013, p. 146. These two categories sometimes overlap.

³⁵ Redfern and Hunter (2009) p. 365, para 6.08.

of procedure, including transparency issues, by agreement.³⁶ Consequently, where the interests of both parties are best served by confidentiality, this is likely to reduce the level of transparency to the minimum under the applicable regime, as the parties will agree on confidentiality in accordance with their common interests. However, as we shall see, the parties will not be able to derogate from mandatory transparency provisions in the treaty providing the basis for the arbitration.

Where the parties' interests with regard to transparency do not overlap, there will normally be no basis for an agreement on the issue, and the question will have to be decided by the tribunal on the basis of its powers to determine the procedure and conduct of the arbitration.³⁷

An array of possible interests may provide the basis for a party's position in favour of transparency, and a comprehensive discussion at this point would go too far. For instance, investors may have a strong interest, as well as related statutory or contractual obligations, in providing shareholders with accurate information concerning its activities, including pending legal disputes. Furthermore, depending on the circumstances, it is not out of the question that claimants may wish to direct wider public attention, including that of the public in the host state, to the proceedings. This is perhaps most likely in cases involving cor-

³⁶ See e.g. ICSID Convention, Article 44 and Arbitration Rule 20 (2); ICSID Additional Facility Arbitration Rules, Articles 28 (2); UNCITRAL Arbitration Rules (both the 1976 and 2010 versions of the rules), Article 1 (1); Rules of Arbitration of the International Chamber of Commerce ("ICC Arbitration Rules"), Articles 19 and 22 (2); Rules of Arbitration of the London Court of International Arbitration ("LCIA Arbitration Rules"), Article 14 (1); Rules of Arbitration of the Stockholm Chamber of Commerce ("SCC Arbitration Rules"), Article 19; Rules of Arbitration of the Permanent Court of Arbitration ("PCA Arbitration Rules"), Article 1 (1).

³⁷ The various arbitration regimes all provide for wide tribunal powers in this respect. See, e.g., ICSID Convention, Article 44 and Arbitration Rule 19; ICSID Additional Facility Arbitration Rules, Articles 19 and 35; UNCITRAL Arbitration Rules (1976), Article 15 (1), UNCITRAL Arbitration Rules (2010), Article 17 (1); ICC Rules, Articles 19 and 22; SCC Rules, Article 19; LCIA Rules, Article 14; PCA Rules, Article 17 (1).

ruption of state officials, discriminatory treatment or similar instances of wrong-doing on the part of the host state.

States have an interest in providing the public with information on state affairs. This interest may be based on national statutory obligations for disclosure³⁸, public pressure, national tradition or mere self-interest, in the latter case typically with regard to influencing public conception of the dispute and the foreign investor. Developed democracies may have a particularly strong interest in disclosing information pertaining to international legal disputes to its population, as such disputes raise legitimacy and democracy issues deserving of public discussion. Failure to properly inform carries political risk and may lead to trust issues between the state and the public at a later stage. On the other hand, it is not necessarily so that concerns related to public opinion will always be the determining element in a state's position in a transparency issue. Sometimes a state would prefer to settle the dispute in silence. This is perhaps most likely when the dispute relates to state conduct which is suited to alarm other foreign investors or where the public reaction to disclosure is expected to be particularly negative.

The individual investment tribunal is a significant actor by virtue of its stake in and responsibility for the conduct of the arbitration. "An inherent characteristic of the arbitral process is the tribunal's adjudicative role and responsibility for establishing and implementing the

³⁸ The potential obligations of both parties in this respect have been acknowledged by several tribunals, see, e.g., *Metalclad Corporation v. The United Mexican States*, Decision on a Request by the Respondent for an Order Prohibiting the Claimant From Revealing Information, ICSID Case No. ARB(AF)/97/1 (hereinafter "*Metalclad*, Decision on a Request"), paragraphs 9, 10. See also *Loewen Group Inc and Raymond L Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, 5 January 2001 (hereinafter "*Loewen*, Decision on Hearing"), which referenced the *Metalclad* Tribunal on this point, cf. paragraphs 26, 28. Some have argued that agreements on confidentiality and tribunal confidentiality orders may be overridden by such obligations; see Feliciano (2013), p. 20, with references. In several IIAs containing comprehensive transparency provisions the issue is resolved by expressly making procedural confidentiality subject to any national statutes demanding disclosure.

procedures necessary to resolve the parties' dispute."³⁹ Its primary duty is to resolve the specific case before it, including issues of procedure, independent from other tribunals and its legitimacy restricted to the case in question.⁴⁰ This duty extends to securing "the orderly unfolding of the individual case",⁴¹ a matter which, as we shall see below in this thesis, have been central to the way tribunals have approached transparency issues in specific cases. For now it suffices to say that the primary interest of the tribunal lies in protecting the arbitral process. While not necessarily colliding with increased transparency as such, this responsibility entails a certain amount of caution on part of the arbitrators.

There is a wide array of non-party actors with a possible stake in investment disputes. Typical examples are NGOs, e.g. environmental organizations or organizations representing specific business interests, special interests groups such as indigenous peoples, trade unions and industry associations.⁴² It follows then, that such entities are likely to have a significant interest in proceedings being as transparent as possible, as this would entail access to the most information. Furthermore, they are likely to be interested participating in the proceedings. Any third-party's interest in a given dispute is likely to stem from a perception on the part of the third-party as "genuine stakeholder",⁴³ whose interests may be affected by the dispute. NGO and special interest group activity in relation to individual disputes can be addressed from such a perspective.

A final issue pertaining to actors and interests in relation to procedural transparency warrants discussion. Critical commentators are often quick to point to *public interest* in the subject matter of investment disputes as creating a need for increased transparency in arbi-

³⁹ Born (2009) p. 1759.

⁴⁰ Kessedjian (2009) p. 44.

⁴¹ Kinnear and Diop (2006) p. 47, with references to relevant case law.

⁴² These are all actors who at different junctures have been granted access to submit *amicus curiae* briefs to investment tribunals. See Kasolowsky and Harvey (2009) p. 11; Kahn (2009) p. 117.

⁴³ Buckley and Blyschak (2007) p. 354.

tration proceedings. While many investment disputes undoubtedly involve important issues deserving of public attention, the concept of “the public interest” remains rather vague. Who or what constitutes “the public”? What are “public interests”, and how best to safeguard these? Who should be entitled to represent it? Answers to such questions are not obvious.

The issue of the public interest with regard to transparency of arbitration may be approached as two distinct issues. One is the general interest of the public to be informed on matters of importance to them and their society. The review by investment tribunals of the sovereign actions of states should be considered such a matter of public interest.⁴⁴ This interest may be attended to through the dissemination of information concerning disputes by the state. The consistent and comprehensive dissemination into the public domain of information concerning investment disputes would essentially constitute transparency in the most basic sense, in line with the definition adopted above. Another issue is the more complex question of the role of specific public interests in relation to specific proceedings, and whether anyone besides the disputing state may represent such interests in the arbitration. Scholarly discussion and case law on this issue have primarily focused on questions concerning the representation of public interests through *amicus curiae* submissions.

Different public interest affected by a dispute need to be represented by a specific actor in order to potentially make an impact on the decision of the tribunal in question. Typically, and simplistically, there are two ways for this to happen. Firstly, the disputing state may present its opinion on the public interests impacted by the dispute in the proceedings.⁴⁵ Secondly, a third-party may attempt to gain recognition by the tribunal of the relevance of a particular public interest by way of submitting *amicus curiae* briefs.

⁴⁴ Magraw and Amerasinghe (2009) p. 339.

⁴⁵ Kyla Tienhaara refers to the argument promoted by some that it is the disputing state which should represent public interests, and not third parties, though she does not herself support this view. See Tienhaara (2007) p. 239.

1.4 Perceived Advantages and Disadvantages of Transparency

Increased transparency and inclusiveness of investment arbitration is associated with a number of perceived advantages and disadvantages.⁴⁶ With regard to publication of decisions and awards, the potential for transparency leading to an increase in the quality, consistency and predictability of decisions has been pointed out.⁴⁷ It is suggested that the availability of previous decisions provides a more substantial basis for decisions,⁴⁸ and also that the certainty of decisions being subject public scrutiny will promote “accurate, thorough and defensible decisions by arbitrators”.⁴⁹ Furthermore, some have emphasized the possibility of a general increase in the transparency and public participation contributing to increased effectiveness in implementation and popular acceptance of the system, as its legitimacy is likely to be strengthened by the availability of information and reduced secrecy surrounding proceedings.⁵⁰ This process could be self-reinforcing, as increased transparency and third-party participation may result in a newfound public awareness and interest, leading to greater participation in investment disputes by local communities.⁵¹ However, one would assume that whether or not this is considered an advantage depends on one’s perspective. Moreover, it is not necessarily so that greater access to information will lead to increased legitimacy and public acceptance. On the contrary, if the public do not like what is revealed, the legitimacy of the system in the eyes of the general populace may in fact be weakened.

⁴⁶ Putting aside for the time being the notion of inherent value.

⁴⁷ See Magraw and Amerasinghe (2009) p. 345; Delaney and Magraw (2008) p. 761–762; Knahr and Reinisch (2007) p. 111.

⁴⁸ Magraw and Amerasinghe (2009) p. 345. However, the strict focus of arbitrators on the case before them and the lack of any rule of *stare decisis* in investment arbitration are likely to weaken such an effect, see Rubins (2006) p. 5–6.

⁴⁹ Delaney and Magraw (2008) p. 761.

⁵⁰ Ibid. p. 762; Yannaca-Small (2005) p. 11.

⁵¹ Buys (2003) p 134–135.

Another significant potential advantage of increased transparency and inclusiveness is the protection of a broader set of interests. The raised awareness and knowledge likely to result from an increase in transparency of documents and information could lead to more frequent public participation through *amicus curiae* submissions, securing the representation of interests otherwise unlikely to be brought to the attention of tribunals.⁵² However, in the case of such briefs being filed, it is no guarantee that they will be taken into account by tribunals. Often they are not even referenced in awards.⁵³ Nevertheless, the ability of third-party submissions to contribute perspectives different than those promoted by the disputing parties may potentially have an effect on the reasoning of tribunals.

As announced, there are perceived disadvantages to increased openness as well. Increased costs and delay following the carrying out of transparency measures are highlighted as possible consequences of increased transparency obligations.⁵⁴ Considering that arbitration traditionally has not allowed for much openness, the logistical arrangements necessary to provide for dissemination of documents and information and provide for third party participation are rarely in place. To overcome these obstacles may generate costs and delay. More serious, perhaps, are the perceived threats against the privacy, confidentiality and lack of publicity that has traditionally characterized international arbitration,⁵⁵ as well as the related danger of re-politicization of investment disputes.⁵⁶ For those who cherish these particular values of traditional arbitration, increased openness represents a real threat to the system.

⁵² Magraw and Amerasinghe (2009) p. 349–350.

⁵³ De Brabandere (2011) p. 111.

⁵⁴ Delaney and Magraw (2008) p. 762.

⁵⁵ Ibid.; Sabater (2010) p. 50–52; Levine (2011) p. 220–221.

⁵⁶ Rubins (2006) p. 6–8.

1.5 Method and Structure

At this point, certain methodological issues must be addressed. Investment treaties, being interstate agreements, are instruments of public international law.⁵⁷ The applicable law in treaty-based investment arbitration is the investment treaty, and in turn, the applicable law for the interpretation of treaties is international law, as expressed in the Vienna Convention on the Law of Treaties (“VCLT”), Articles 31 and 32.⁵⁸ In principle, this also applies to the interpretation of investment treaty provisions on procedure, including provisions on procedural transparency. However, the extent to which investment treaties regulate such issues varies. Furthermore, investment tribunals are operating according to procedural rules mainly developed in private commercial arbitration.⁵⁹ In the absence of express rules in the primary source, the applicable arbitration rules provide the basis for the procedure. This implicitly follows from treaty provisions on investor-state dispute settlement making different arbitration regimes available to investor claimants.⁶⁰ This creates a two-level dynamic vital for the present study. This is because the level of detail in an investment treaty’s provisions on arbitral procedure determines the scope of application of the arbitration rules applicable under the treaty, including rules on the exercise of tribunal procedural discretion and the access of the disputing parties to agree on differing arrangements.

The method I have chosen consists of addressing procedural transparency on these two levels. I will address the prevalence and characteristics of transparency regulation in investor-state dispute settlement provisions in international investment treaties. Considering the amount of investment treaties currently in force worldwide, it has been necessary to con-

⁵⁷ Roberts (2013) p. 50.

⁵⁸ MchLachlan, Shore and Weiniger (2007) p. 66; Weeramanrty (2012) p. 13–14. The principle is expressed in the ICSID Convention, Article 42 (1); Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155UNTS 331.

⁵⁹ See, e.g., Brown (2010) p. 659.

⁶⁰ Occasionally, it is stated outright, see e.g., U.S.–Uruguay BIT (2005), Article 24 (5): “The arbitration rules applicable ...shall govern the arbitration except to the extent modified by this treaty”.

fine the analysis to a limited selection of treaties. The particulars of this selection will be accounted for in the introduction to chapter 2.

To the extent that dispute settlement provisions supplements or deviates from the applicable arbitration rules under the treaty, such modifications are binding on the arbitral tribunal and the parties. This follows from an interpretation of the treaty as the legal basis for the dispute. If the treaty provides procedural arrangements different from those of the applicable rules, these differences must be interpreted as an expression of the will of the parties. The treaty is the instrument of consent, stating the conditions on which the treaty parties give their consent to arbitration.⁶¹ The investor, in submitting his/her claim to arbitration under the provisions of the treaty, accepts these conditions, including any modifications of the applicable rules. With regard to the applicable rules, the modifications must thus be respected as an agreement between the disputing parties.⁶² Any procedural modifications, then, constitute *lex specialis* regulations of the arbitral procedure, applying specifically to the treaty regime in question; as opposed to the *lex generalis* rules of the different international arbitration rules.⁶³ Against this background, I will investigate the extent to which the treaties selected for review create mandatory solutions with regard to transparency of arbitral proceedings.

The second part of this study, chapter 3, consists of a presentation and analysis of key transparency issues with a view to how these are regulated in the arbitration rules most commonly provided as alternatives for dispute settlement in investment treaties. I will address relevant case law on these issues. Underlying this approach is a wish to illustrate how the *lex generalis* regime of international arbitration regulates transparency of proceedings in the absence of express rules in the primary source, i.e. the treaty. Reviewing case law is

⁶¹ Onwuamaegbu (2009) p. 72.

⁶² See, e.g. UNCITRAL Arbitration Rules, Article 1 (1).

⁶³ Note that ICSID, in contrast to other international arbitral frameworks, in itself constitutes such a *lex specialis* regime, as it is designed exclusively for investment arbitration.

essential to this purpose as the rules themselves do not always provide clear solutions to the issues at hand, which instead become subject to procedural discretion.

There is no formal binding rule of precedent in investment arbitration.⁶⁴ The traditional position is that “each tribunal is sovereign, and may retain . . . a different solution for resolving the same problem”.⁶⁵ However, tribunals do tend to build on earlier practice, to the degree that some have pointed to a development towards a *de facto* system of precedent in treaty arbitration.⁶⁶ In the present context, one can clearly see similar reasoning on transparency issues in a number of cases, and references to previous tribunals are prevalent, which support the notion of a *de facto* practice. It must nevertheless be kept in mind that the degree to which tribunals build on earlier case law is not the result of a precedent rule as such.

Another point worth noting concerning the review of case law in this study is the general lack of transparency characterizing the system. Awards and decisions under other institutional regimes than ICSID and transparent treaty regimes are rarely and inconsistently available to the public.⁶⁷ Consequently, the assortment of decisions available for this study does not necessarily reflect the full range of tribunal approaches on the issues. In itself, this simple observation may illustrate some of the challenges with regard to the transparency of the system. All the decisions subject to analysis in this study have been rendered under UNCITRAL, the ICSID Convention⁶⁸ or ICSID Additional Facility rules.

⁶⁴ Schill (2009) p. 288–292; Similarly Alvik (2011) p. 6–7.

⁶⁵ *AES Corporation v. The Argentine Republic*, ICSID Case No ARB/02/17, Decision on Jurisdiction, 26 April 2005, paragraph 30.

⁶⁶ Schill (2009) p. 321; Schreuer and Weiniger (2008) p. 1196.

⁶⁷ Dugan et al. (2008) p. 77.

⁶⁸ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 U.N.T.S. (1966) 159 [hereinafter “ICSID Convention”].

The chosen approach hopefully entails an emphasis on the interplay between investment treaties, arbitration rules and tribunal procedural powers which provides the basis for resolving transparency issues in arbitral proceedings.

2 Transparency provisions in IIAs – different approaches and recent developments

2.1 Introduction

As the power of tribunals to determine issues of procedure is limited to issues not determined by the treaty providing the basis for the dispute (or by agreement between the parties), treaties providing mandatory transparency provisions curtail the discretionary power of the arbitrators to give orders to the contrary. It follows that the extent of transparency regulation the body of treaties in force will have significant effects on the level of transparency in investment arbitration proceedings as a whole. Against this background, an examination of the prevalence of express provisions on procedural transparency issues in the international body of BITs and other types of international investment agreements (“IIAs”) would contribute to shed light on the conditions for increased transparency of investment arbitration.

At the time of writing, the number of concluded IIAs worldwide exceeds 3000.⁶⁹ The number of IIAs currently in force complicates any comprehensive analysis of the full international investment treaty landscape. As a consequence, I have limited my examination to registered BITs signed between 2010 and 2013 for which text were available through the databases of UNCTAD⁷⁰ at the time of consulting the database, as well as all the bilateral and regional RTAs that have been made publicly available through the website of the WTO⁷¹. The most recent versions of the model investment treaties of a number of notable

⁶⁹ Out of a total of 3196 agreements, 2857 are BITs, and 339 so-called “other IIAs”, a category encompassing, among other types of agreements, regional trade agreements (“RTA”) containing some sort of investment regulation, though not necessarily investor-state dispute settlement. See UNCTAD (2013) p. 101.

⁷⁰ Accessible here:

[http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-Tools.aspx](http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-Tools.aspx)

(Treaties retrieved May - June 2013).

⁷¹ Accessible here: <http://rtais.wto.org/UI/PublicAllRTAList.aspx> (Treaties retrieved June-July 2013)

states, including Canada, the United States, China and the United Kingdom, have also been examined. Model agreements provide useful illustrations of states' attitudes and default policy positions on certain issues, including procedural transparency.⁷² Furthermore, model treaties, when compared to concluded treaties, serve to highlight differences and may illuminate the power relationships, the bargaining power and the priorities of negotiating parties. And, depending on the circumstances, deviations from a model treaty in concluded treaties may constitute a significant factor in the interpretation of the latter.⁷³

The rationale behind this particular delineation with regard to document selection, besides time and space constraints, is that it enables a relatively comprehensive and thorough analysis of recent trends in state practice concerning investment treaty design, and simultaneously makes possible the identification of interesting differences and nuances between states, while at the same time providing, at least to a degree, a representative impression of the status quo. One could well argue that limiting the selection of BITs to the last three-year period creates a danger of painting a skewed and simplistic image, possibly missing interesting nuances and approaches in relation to treaty design, especially because a number of states did not enter into BITs in this period. However, including in the examination all WTO-registered RTAs in force, as well as selected model investment treaties, should at least to a degree compensate for eventual imbalances created by the somewhat limited selection of BITs.

To further compensate for potential imbalances created by the differences in levels of treaty-making activity between different states in the period 2010-2013, and because only 41 out of the 113⁷⁴ BITs concluded in the designated time period were actually available for

⁷² On model treaties, see Brown (2013); Newcombe (2013), pp. 21–22.

⁷³ Brown (2013) p. 11; Schill (2009) pp. 312–214. Others are somewhat more reserved, see Dolzer and Schreuer (2012) p. 14, in footnote 50.

⁷⁴ This number is based on the country-specific lists of signed BITs available through the database of UNCTAD, see

examination through the database of UNCTAD or through the websites of the respective governments at the time of conducting the survey, I have selected an additional 30 BITs from between 2004 and 2010. The selection includes treaties involving states from all continents, both developing and developed ones. I have made efforts to include treaties concluded by countries which were not represented among the treaties from between 2010 and 2013 for which text were available, including treaties involving states which are among those party to the highest number of BITs, such as Germany, France, Switzerland and the Netherlands.⁷⁵

The decision to limit the supplemental selection to treaties concluded between 2004 and 2010 is based on 2004 being the year significant revisions with regard to transparency were introduced in the model investment treaties of the United States and Canada. These revisions are widely considered to be the first examples of comprehensive treaty regulation of procedural transparency.⁷⁶ As will be accounted for in the following section, the accelerated development with regards to transparency in investment arbitration originated within the context of the NAFTA,⁷⁷ and the US and Canadian model treaty revisions of 2004 are

<http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20%28IIA%29/Country-specific-Lists-of-BITs.aspx?Do=1,50>.

⁷⁵ Non-conclusive numbers are provided by ICSID, see <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewBilateral&reqFrom=Main> (last accessed 29 December 2013).

⁷⁶ See, e.g., Born and Shenkman (2009) p. 32–33; Ortino (2013) pp. 125–126. The conclusion of the United States-Chile FTA (signed 2003), the United States-Singapore FTA (signed 2003) and the Dominican Republic-Central American/United States FTA (“CAFTA-DR”, signed 2004) coincides in time with the US model revision of 2004, and reflect its content with regard to transparency of arbitral proceedings.

⁷⁷ North American Free Trade Agreement, done at Washington on December 8 and 17, 1992, at Ottawa on December 11 and 17, 1992, and at Mexico City on December 14 and 17, 1992, Can.-Mex.-U.S., reprinted in 32 I.L.M. 289 (1993).

closely related to these early developments.⁷⁸ Against this background, BITs concluded in the years prior to 2004 is not likely to contain provisions of interest for this thesis.

In the following, I will discuss procedural transparency in the context of the examined treaty materials. The primary questions are whether and how states choose to, or not to, promote transparency in their IIAs. Against the background of these questions, I will present my findings with regard to express treaty regulation of transparency, and then discuss these findings, with a view to possible explanations for the existence, or lack thereof, of specific transparency regulation in investment agreements.

I will structure the discussion according to a division between BITs and other IIAs, the latter group consisting primarily of primarily free trade agreements (“RTAs”/“FTAs”). Such a division makes it easier to detect differences between the two treaty types. Furthermore, there seems to be an ongoing shift from traditional BITs, with an exclusive focus on investments, to broader, more comprehensive trade agreements, both bi- and multilateral. Thus, separating the two categories entails an investigation of whether the different nature and contexts of the treaty types influence the design and content of concluded agreements. The question becomes whether treaty type is significant with regard to the extent and details of transparency regulation in individual agreements.

Before presenting the findings of the conducted examination, however, I will introduce the specific treaty regime of the North American Free Trade Agreement (NAFTA). State and Tribunal practice under NAFTA have played a central role in the evolution towards more transparent investment arbitration. This evolution is essential for a proper perspective on later developments in the investment treaty design of Canada and the United States, and for a precise analysis of the extent to which the developments within NAFTA have influenced other states’ subsequent treaties with regard to the regulation of transparency in arbitration.

⁷⁸ See Lévesque and Newcombe (2013) pp. 32–33.

2.2 The Role and Significance of the NAFTA

The North American Free Trade Agreement, consisting of Mexico, Canada and the United States, entered into force January 1, 1994.⁷⁹ The agreement established what today constitutes the largest free trade area in the world, covering a population of close to 450 million people and a combined annual gross domestic product of approximately \$ 19.5 trillion⁸⁰. As well as regulating trade in goods and services and providing rules on intellectual property and technical barriers to trade, the agreement provides investment protection and mechanisms for investor-state dispute settlement.

Investments are covered by NAFTA Chapter 11. The purposes of Chapter 11 are similar to those of any investment treaty, i.e. promoting investment, protecting investments and providing mechanisms for dispute settlement.⁸¹ Investor-state arbitration is provided in section B of the chapter, which outlines the arbitral process in detail. The international dispute settlement mechanisms available to investors are arbitration under the ICSID convention, under the ICSID Additional Facility Rules, or under the UNCITRAL Arbitration Rules.⁸² According to Article 1120 (2), the applicable rules govern the proceedings except

⁷⁹ Office of the United States Trade Representative: <http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta> (last accessed 10 September, 2013).

⁸⁰ Estimated numbers for 2012, cf. the CIA World Factbook, available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html> (last accessed 29 December 2013).

⁸¹ Gantz (2003) p. 683.

⁸² NAFTA Article 1120 (1). To date, all NAFTA Chapter 11 arbitrations have been submitted under the Additional Facility Rules or UNCITRAL, as a consequence of Mexico not being party to the ICSID Convention, and Canada not having ratified it, despite having signed the convention in 2006. In November 2013, however, Canada ratified the Convention. Consequently, claims against Canada and the United States, by investors from these two states may now be submitted to arbitration under the ICSID Convention. See ICSID Press release:

<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=>

to the extent modified by the provisions of the NAFTA. Furthermore, according to Article 1131 (2) interpretations by the Free Trade Commission of the provisions of the agreement are binding on tribunals. As such, the NAFTA agreement, constituting the instrument on which the treaty parties base their consent to dispute settlement, contains mechanisms establishing certain mandatory procedural arrangements for arbitration under the regime.

In the context of the present study, there are two instances of express regulation of the transparency of arbitral proceedings in the original text of the NAFTA. To the extent that the provisions in question differ from the applicable arbitral rules, they constitute “modifications” in the sense of Article 1120 (2). The two provisions, taken together, provide transparency of information on the early stages and conclusion of investment disputes, but do not concern the procedural stages in-between.

The first of the two, Article 1126 (13), provides that, *inter alia*, notices of arbitration must be sent to the NAFTA Secretariat and put in a public register.⁸³ Consequently, anyone may access the registry in order to attain information on ongoing disputes. To interested third parties, NGOs and the like, public registries constitute an important precondition for public discussion, lobbying activities and other operations, as these provide a permanent framework for the dissemination of information concerning the existence of pending investment disputes. Without a publicly accessible medium for this information, knowledge of proceedings initiated under Chapter 11 would have been far less likely to reach the general public.

The other express provision on procedural transparency is article 1137, paragraph 4 cf. annex 1137.4. The provision sets down conditions for the publication of final arbitral awards. Interestingly, the conditions for a disputing party’s access to make an award public in arbi-

[AnnouncementsFrame&FromPage=Announcements&pageName=Announcement138](#)> (accessed 30 December 2013).

⁸³Bjorklund (2013) p. 506.

trations involving Mexico are different from those involving Canada and the United States. In disputes to which Mexico is a party, Annex 1137.4 provides that the applicable arbitration rules govern the issue of the publication of awards. In disputes involving the two other NAFTA states, either the disputing state or the disputing investor may publish the award without regard to whether or not the other disputing party consents. The reference to the applicable rules with regard to Mexico either completely rules out unilateral publication of awards, by demanding the consent of both parties, or leaves the decision to each disputing party.⁸⁴ Consequently, the Mexican position, depending on the rules applied to a given dispute, may make it more difficult for a disputing party to make an award public. Consequently, disputes to which Mexico is party are potentially less transparent than disputes involving the United States and Canada.

The transparency of Chapter 11 arbitral proceedings is no longer governed exclusively by the provisions of the NAFTA text. Somewhere between the late 1990s and the early years of the new millennium, a shift seems to have occurred with respect to how the NAFTA parties and Chapter 11 tribunals related to procedural transparency. It is difficult to point to a specific time when such a shift occurred, but it seems safe to say that by 2001 procedural transparency as a significant concern had made a breakthrough in the NAFTA.⁸⁵ The de-

⁸⁴ The ICSID and ICSID Additional Facility rules are different from the UNCITRAL Rules on the topic of publication of final awards, see section 3.6.

⁸⁵ From early on, the United States argued for the primacy of its Freedom of Information Act over arbitration rules and decisions with regard to access to procedural documents. See Delaney and Magraw (2008) p. 744. As early as 1999 the United States during the proceedings in the *Loewen* case argued, with limited success, for the public availability of all filings pertaining to the proceedings. See *Loewen Group Inc and Raymond L Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, 5 January 2001 (hereinafter "*Loewen*, Decision on Hearing"), paragraph 24. Similar arguments were advanced by the United States in the *Mondev* proceedings; see *Mondev International Ltd v United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2001 (hereinafter "*Mondev* Award"), paragraph 21. In the *Pope and Talbot* and *S.D. Myers* cases, Canada argued for the distribution of procedural documents to subnational government units, without getting Tribunal support. See *Pope & Talbot*

velopment should be viewed against a background of increasing public interest in investment arbitration and critical attention from civil society groups, academics and media.⁸⁶ Among the NAFTA parties, the United States and Canada have expressed particular interest in heightening the level of transparency in Chapter 11 arbitrations. Mexico, on the other hand, has not been as vocal in this regard.⁸⁷

The US Trade Act of 2002 expressed this and other concerns in the form of trade negotiation objectives.⁸⁸ With regard to investment arbitration, the objectives were to ensure “the fullest measure of transparency in the dispute settlement mechanism”⁸⁹, by providing for the public availability of all documents and decisions, ensuring public hearings and establishing mechanisms for the acceptance of *amicus curiae* submissions from representatives of civil society and business.⁹⁰ These objectives were reflected in the 2004 revision of the US Model BIT as well as in later FTAs and BITs of the United States.⁹¹ In the context of Chapter 11 arbitration, individual arbitral tribunals have responded to these trends and concerns, and, through interaction with the NAFTA states and disputing parties, played key roles in increasing the transparency of the regime.

v Canada, NAFTA (UNCITRAL), Procedural Order No. 5 (hereinafter “*Pope & Talbot*, Procedural Order 5”), 17 December 1999; *S.D. Myers v Canada*, NAFTA (UNCITRAL), Procedural Order No. 16 (hereinafter “*S.D. Myers*, Procedural Order 16”), 13 May 2000. The *Pope & Talbot* Tribunal, however, later amended the order to allow for distribution of documents to subnational trade representatives to secure “the proper functioning and due observance of the NAFTA”, see *Pope & Talbot*, Letter to Parties of 2 April 2000, paragraph 7.

⁸⁶ See Bjorklund (2013) pp. 506–507; Gantz (2003) p. 748; Hafner-Burton (2013) p. 15.

⁸⁷ Gantz (2003), p. 747. See Coe (2006) pp. 1377–1378, on the reluctance of Mexico with regard to expanding the transparency of the regime.

⁸⁸ See Trade Act of 2002, Pub. L. 107–210, 116 Stat. 933, sec. 2102.

⁸⁹ *Ibid.*, sec. 2102(b)(3)(H).

⁹⁰ *Ibid.*, sec. 2102(b)(3)(H)(i)–(iii). See Parra (2012) p. 240.

⁹¹ Parra (2012) p. 240.

The NAFTA parties' primary instrument with regard to directly influencing the interpretation of the provisions of chapter 11 by arbitral tribunals is the Free Trade Commission ("FTC"). According to NAFTA article 1131 (2), an arbitral tribunal is bound by an interpretation by the FTC of the provisions of the NAFTA. Consequently, through the issuing of general statements concerning the interpretation of the agreement, the parties may, to an extent, steer the interpretation of the agreement in their desired direction.⁹² To date, three interpretative statements regarding the procedure of Chapter 11 arbitrations have been issued by the FTC, one in 2001 and two in 2003.⁹³ All three may be viewed in connection with heightened critical interest as well as with a handful of tribunal decisions from the years 2000 and 2001, some quite restrictive, some of which broke new ground on transparency issues such as access to documents and third-party participation.⁹⁴

The first FTC statement on transparency was the Notes of Interpretation of Certain Chapter 11 Provisions, from July 2001.⁹⁵ According to the statement, "[n]othing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration".⁹⁶ It goes on, stating that "subject to the application of Article 1137 (4), nothing in

⁹² The provision has been called a "safety valve". See Alvarez and Park (2003) p. 397.

⁹³ The Statement on Notices of Intent, while indirectly having some relevance to transparency of proceedings will, as a result of space constraints, not be addressed in the following. For certain perspectives on the relevant issues, see VanDuzer (2007), pp. 701–702; Delaney and Magraw (2008) p. 742. See Free Trade Commission, Statement on Notices of Intent to Submit a Claim to Arbitration (7 October 2003), accessible at < <http://www.state.gov/documents/organization/38792.pdf>> (last accessed 13 September 2013).

⁹⁴ Most notably the tribunals in *Loewen v United States*, *Pope & Talbot v Canada*, *S.D. Myers Inc v Canada*, *Metalclad Corporation v United Mexican States*, *Methanex v United States*, *United Parcel Services, Inc v Canada*.

⁹⁵ NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, (July 31 2001). Accessible at < <http://www.state.gov/documents/organization/38790.pdf>> (last accessed 11 September 2013).

⁹⁶ Section A, paragraph 1. The preceding year, the tribunal in *S.D. Myers*, established according to NAFTA chapter 11 under UNCITRAL Arbitration Rules, had concluded that no "general principle of confidentiality

the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven Tribunal.”⁹⁷ With regard to the applicable rules, the FTC, “in accordance with NAFTA Article 1120 (2)”, states that “nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven Tribunals, apart from the limited specific exceptions set forth expressly in those rules.”⁹⁸ The reference to “limited specific exceptions” points to those applicable rules expressly regulating confidentiality and privacy issues,⁹⁹ but as we recall, these only apply to the extent that they are not modified by the NAFTA, cf. Article 1120 (2). Having noted the absence of any principle or duty of confidentiality in the NAFTA and the applicable rules, and noted the corresponding absence in the NAFTA and the rules of any restrictions on the publication of procedural documents, the statement declares the agreement among the NAFTA parties to make public “in a timely manner all documents submitted to, or issued by, a Chapter Eleven Tribunal, subject to the redaction of” confidential information and information protected by law or by

exists in an arbitration such as that currently before this tribunal”, see *S.D. Myers Inc v Canada*, Procedural Order No. 16 (hereinafter “*S.D. Myers*”), 13 May 2000, paragraph 8, and below section 3.3.

⁹⁷ The reference to Article 1137 (4) makes clear that the different conditions applying to Mexico on the one hand and Canada and the United States on the other with regard to the publication of final awards, are not affected by the statement. Consequently, and despite the heightened transparency practices stemming from the statement, publication of awards in arbitrations involving Mexico is still regulated by the applicable arbitration rules. Since this issue is already explicitly regulated by Article 1137 (4) cf. annex 1137.4, the FTC would surpass its powers of interpretation, and de facto change the original treaty, if the statement required Mexico to publish final arbitral awards.

⁹⁸ Section A, paragraph 2 (a).

⁹⁹ UNCITRAL, ICSID and ICSID Additional Facility all contain express rules on access to hearings and the publication of final awards, but not on document transparency in general. See chapter 3.

the applicable arbitral rules.¹⁰⁰ This, at least in principle, establishes full document transparency as the general rule in NAFTA Chapter 11 arbitrations.¹⁰¹

The 2001-statement was issued in the form of a binding interpretation of the NAFTA under article 1131 (2), and as such should establish document transparency as the default rule in NAFTA arbitrations. One may raise the question of whether such a wide statement, not only on what is and what is not provided by the NAFTA but on the provisions of the applicable arbitration rules as well, is in accordance with the powers of the FTC under article 1131 (2).¹⁰² Essentially, the statement notes the absence of general restrictions upon publication of documents under NAFTA and the applicable rules, and then turns this assertion on its head, providing a general discretion upon the disputing NAFTA party to make such documents public in the form of a procedural modification under Article 1120 (2).¹⁰³ It is not given that such a manoeuvre truly constitutes an “interpretation ... of a provision” under Article 1131 (2). Whatever the case may be, the objectives of the statement have been largely respected by Chapter 11 tribunals and the NAFTA parties have since consistently published documents on their websites.¹⁰⁴ The FTC statement represents an important and significant shift in how states approach procedural transparency in investor-state disputes,

¹⁰⁰ Section A, paragraph 2 (b). The remaining of paragraph 2 regulates the parties’ access to disclose confidential information to counsel and government officials, as well as clarifying that the general exceptions with regard to national security and disclosure of information in Articles 2102 and 2105 still apply.

¹⁰¹ Bjorklund (2013) p. 507.

¹⁰² Born and Shenkman refers to the statement as one which “purportedly ‘interprets’ NAFTA chapter 11”. See Born and Shenkman (2009) p. 31.

¹⁰³ VanDuzer (2007) pp. 703–704, indicates that the reference in the statement to “limited specific exceptions” in effect makes document transparency subject to the procedural discretion of individual Tribunals under the applicable rules. I do not immediately support his interpretation.

¹⁰⁴ For Mexico, see <<http://www.economia.gob.mx/comunidad-negocios/comercio-exterior/solucion-controversias/inversionista-estado>> (both NAFTA and non-NAFTA cases listed); Canada, see <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/diff-gov.aspx?lang=eng>>; the United States, see <<http://www.state.gov/s/l/c3741.htm>>.

and it has been influential on the development with regard to transparency within other important arbitration regimes, primarily ICSID and the UNCITRAL rules.¹⁰⁵ This raises the issue of whether there has been an influence also on the contents of IIAs of other states. The relationship between increased document transparency in the NAFTA and transparency regulation in later IIAs will be explored in subsequent sections of chapter 2.

The next important FTC statement with regard to procedural transparency came about in response to several tribunal decisions on the topic of non-disputing parties in investment arbitration, especially with the right of third parties to submit written submissions, so-called *amicus curiae* briefs, to arbitral tribunals. On January 15, 2001, the tribunal in the *Methanex* case, operating under UNCITRAL rules, decided that it had the authority to allow for the submission of such briefs.¹⁰⁶ On 17 October the same year, the tribunal in the *UPS* case, also conducted according to UNCITRAL rules, reached the same conclusion.¹⁰⁷ Reflecting these decisions, the FTC in October 2003 issued its Statement on Non-Disputing Party Participation.¹⁰⁸ The statement reaffirmed the reasoning of the *Methanex* and *UPS* tribunals by stating that no provision of the NAFTA “limits a Tribunal’s discretion to accept written submissions from a person or entity that is not a disputing party.”¹⁰⁹ Note that the statement does not require Tribunals to accept *amicus* briefs, but rather subscribes to the interpretations of the UPS and Methanex Tribunals on the matter. In section B of the statement, the FTC recommends certain formal and material requirements for applications to submit and the submissions themselves, as well as specific guidelines to the reasoning of

¹⁰⁵ Bjorklund (2013), p. 508; Parra (2012) p. 249–250.

¹⁰⁶ *Methanex*, Decision on Amici.

¹⁰⁷ *United Parcel Services of America v Canada* (UNCITRAL), Decision re Amicus Intervention, 17 October 2001 (hereinafter “*UPS*, Decision re Amicus”).

¹⁰⁸ Bjorklund (2013) p. 508; NAFTA Free Trade Commission, Statement on Non-Disputing Party Participation (7 October 2003), accessible at <<http://www.state.gov/documents/organization/38791.pdf>> (last accessed 12 September 2013).

¹⁰⁹ *Ibid*, Section A, paragraph 1.

tribunals when deciding on whether or not to accept a submission. According to the statement, a tribunal should consider “the extent to which:

- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the non-disputing party submission would address matters within the scope of the dispute;
- (c) the non-disputing party has a significant interest in the arbitration; and
- (d) there is a public interest in the subject-matter of the arbitration.”¹¹⁰

Furthermore, the FTC recommended that tribunals ensure that any third party submissions do not disrupt the proceedings and that no disputing party is unduly burdened or unfairly prejudiced by such submissions.¹¹¹ The statement also makes clear that tribunals are under no obligation to address submitted briefs in their awards.¹¹²

In *Methanex*, the tribunal, despite having asserted its authority to accept submissions from non-disputing parties, did not decide whether to actually accept the submissions being petitioned for, instead being “at present minded to receive such submissions subject to procedural limitations still to be determined by the Tribunal.”¹¹³ Following the statement of the FTC, the Tribunal declared that it adopted the procedure recommended in the statement, section B.¹¹⁴ This procedure has generally been adopted by later NAFTA tribunals.¹¹⁵ Cer-

¹¹⁰ Ibid, Section B, paragraph 6.

¹¹¹ Ibid, Section B, paragraph 7.

¹¹² Ibid, Section B, paragraph 6.

¹¹³ *Methanex*, Decision on *Amici Curiae*, paragraph 53.

¹¹⁴ ICSID News Release, 30 January 2004. Accessible at: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement9 (last accessed 12 September 2013).

¹¹⁵ Kinnear (2005) p. 6.

tain perspectives on how Chapter 11 case law on *amicus* participation relates to tribunal practice under other regimes will be addressed in section 3.5.

The last of the fundamental procedural transparency issues that has been specifically dealt with in the context of the NAFTA and the FTC is the question of public and third-party access to arbitral hearings. The NAFTA contains no express provisions concerning public access to hearings, and the FTC has not been willing to direct the course of tribunals and disputing parties on this point, thus, no statements concerning public access to Chapter 11 hearings have been issued.¹¹⁶ The issue has come up in several arbitrations under Chapter 11, with tribunals generally having been unwilling to open up proceedings without the consent of the parties.¹¹⁷ As a response, Canada and the United States in October 2003 both issued unilateral statements, declaring their willingness to open up arbitral hearings in all cases against them, conditional upon the consent of disputing investors and subject to the protection of confidential information.¹¹⁸ In 2004, Mexico, after having received criticism

¹¹⁶ Since the NAFTA is quiet on the issue, and all the applicable arbitral rules under the treaty either demand explicit party consent (the recent UNCITRAL transparency rules notwithstanding) or an absence of objection from either party in order for a hearing to be open, there is arguably no room for an interpretation under NAFTA Article 1131 (2) establishing open hearings as binding rule under NAFTA. See chapter 3.4.

¹¹⁷ See *Methanex*, Decision on *Amici*, and *UPS*, Decision re *Amicus*. In both cases, the groups that petitioned for *amicus* participation also sought access to the hearings. The petitions were denied, in both cases on the basis of UNCITRAL Arbitration Rule 25 (4), which states that “[h]earings shall be *in camera* unless the parties agree otherwise.” See *Methanex*, Decision on *Amici*, paragraph 42, and *UPS*, Decision re *Amicus*, paragraph 67. In both the *Methanex* and *UPS* proceedings the parties eventually agreed on making the hearings open to the public, which were consequently broadcast live through closed-circuit television. See *Methanex*, Final Award, 3 August 2005, paragraph 8; *UPS*, Award on the Merits, 24 May 2007 paragraph 4; On the publicity of the hearings on jurisdiction in the *UPS* proceedings, see ICSID News Release, 28 May 2001: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement6 (last accessed 6 January 2014).

¹¹⁸ For the U.S statement, see:

<http://www.ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf>.

for failing to issue a similar statement¹¹⁹, followed suit.¹²⁰ The clear position expressed through these statements signified a strong orientation towards the opening up of investment arbitration forums, and have likely increased pressure upon disputing investors to give their consent to open hearings.¹²¹ However, an examination of the procedural documents published by the NAFTA parties on their respective webpages does not necessarily support the claim that “virtually all Chapter 11 hearings are now open to the public”.¹²² Although the majority of Chapter 11 arbitrations in the years following the statements have featured hearings open to the public, proceedings have been closed to the public in three cases against Canada, and possibly also in cases against Mexico.¹²³

For the identical Canadian statement, see <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/nafta-transparency-alena-transparence.aspx?lang=eng>> (both last accessed 18 September 2013).

¹¹⁹ See Mann (2003) p. 4.

¹²⁰ NAFTA Free Trade Commission Joint Statement, “Decade of Achievement” (July 16, 2004), available at <http://www.ustr.gov/archive/Document_Library/Press_Releases/2004/July/NAFTA_Free_Trade_Commission_Joint_Statement_-_A_Decade_of_Achievement.html> (last accessed 18 September 2013).

¹²¹ Asteriti and Tams (2010) p. 794.

¹²² Kinnear (2005) p. 3.

¹²³ With regard to post-2003 cases against Canada, hearings were closed to the public in *Gallo v Canada* (see Procedural Order 1, 4 June 2008), *Detroit International Bridge Company v Canada* (see Confidentiality Order, 27 March 2013) and *Chemtura Corporation v Canada* (see Confidentiality Order, 21 January 2008). There have been held hearings open to the public in 8 cases involving Canada in this period. With regard to cases brought against Mexico, the picture is somewhat less than transparent. This is because of a peculiar tendency of procedural orders missing from the list of published case documents on the webpages of the Mexican government. Consequently, I have not been able to determine which, if any, Chapter 11 cases against Mexico initiated after the Mexican commitment to open hearings in 2004 have featured hearings accessible by the public. As far as the United States are concerned, in addition to the *Methanex* case, all Chapter 11 cases initiated after the 2003 statement have featured open hearings, with the possible exception for the *Softwood Lumber v United States* consolidation proceedings, for which I have not been able to locate any procedural order or other document referencing the issue of open hearings.

The developments accounted for in this section together constitute a broad and comprehensive approach to procedural transparency in the context of the NAFTA. Given the limitations of the text of the original treaty with regards to final awards and public hearings, it is unlikely that the NAFTA parties could have established a more transparent procedure. In 2004, Canada and the United States both incorporated comprehensive transparency provisions in their model investment treaties.¹²⁴ The model revisions mirrored the content of the FTC statements as well as the unilateral statements on public hearings.¹²⁵ Through the incorporation of extensive transparency provisions in these model agreements, which provide the basis for US and Canadian IIAs, the increased transparency of NAFTA arbitration was extended beyond this specific regime. It is easy to interpret the model revisions as direct responses to developments specific to the NAFTA. However, it is perhaps a more enlightening approach to view the FTC initiatives and the later US and Canadian model revisions as specific expressions of US and Canadian objectives with regard to increase transparency in investment arbitration in general. The United States Trade Act of 2002 highlighted the aim of increasing the transparency of investment arbitration, without any explicit reference to NAFTA. And as we recall, both the United States and Canada had argued for increased transparency in Chapter 11 arbitration prior to the FTC statements. Against this background, it is not unlikely that the states would have included express transparency regulation in their models regardless of any particular development in NAFTA arbitration. The FTC statements are nevertheless very significant, first and foremost for establishing NAFTA as the, at the time, most transparent investment arbitration regime, and for provid-

¹²⁴ The revisions were carried over into the new 2012 US Model. See 2012 United States Model BIT, Articles 28 (3) (on *amicus* participation), 29 (on document transparency and public hearings); 2004 Canadian Model FIPA, Articles 38 (document transparency and hearings), 39 cf. Annex C.39 (*amicus* participation). The relevant provisions are included in Annex 1 of this thesis. The full U.S. Model BIT is available at: <http://www.state.gov/r/pa/prs/ps/2012/04/188199.htm> (last accessed 19 August 2013). The full Canadian Model BIT is apparently no longer available through the website of the Department of Foreign Affairs, Trade and Development (DFATD), however it can be found at: <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> (last accessed 19 August 2013).

¹²⁵ Coe (2006) p. 1378.

ing examples of clearly formulated transparency standards. Furthermore, coming in the aftermath of specific decisions on transparency issues, they highlight the interplay between the exercise of tribunal procedural discretion and regulation of procedural regulation at the treaty level. The 2001 Notes of Interpretation may be viewed as a response to the restrictions on transparency put down by the Tribunals in, *inter alia*, the *Loewen*, *Pope & Talbot*, and *S.D. Myers* cases. In all these cases, Canada and the United States, respectively, had argued in favour of transparency without fully convincing the different tribunals.¹²⁶ Coming in the aftermath of these decisions, the statement establishes a new transparency regime in Chapter 11 proceedings, and at least attempts to exclude document transparency as an issue subject to the discretion of tribunals as part of their procedural powers under the applicable rules. As such, it can be seen as an example of intended *ex post lex specialis* regulation of the treaty regime. A similar perspective may be applied to the Statement on Non-Disputing Party Participation. This statement was an affirmation of the conclusions of the *Methanex* and *UPS* Tribunals on the authority of tribunals to accept *amicus* briefs under the UNCITRAL rules.¹²⁷ However, rather than retroactively censoring the decisions, as in the case of the 2001 statement, the NAFTA parties instead supported the Tribunals' interpretations of the rules.

The advance of procedural transparency in the NAFTA and the subsequent revisions of the Canadian and US model investment agreements raise the question of whether a similar development can be observed in later treaties involving other states. If such developments may be observed, how prevalent are they? Which actors have driven the developments? Are there regional or other significant differences at work? What is the level of transparency established under the different treaty regimes? These questions all relate to the bigger

¹²⁶ See *Loewen*, Decision on Hearing, paragraph 24; *Pope & Talbot*, Procedural Order 5; *S.D. Myers*, Procedural Order 16.

¹²⁷ Simultaneously reflecting the US position on *amicus* submissions expressed in the Trade Act of 2002, see Trade Act of 2002, Pub. L. 107–210, 116 Stat. 933 sec. 2102(b)(3)(H)(iii).

question of the extent and particulars of express transparency regulation in recent IIAs? These issues will be addressed in the following sections.

2.3 Transparency Provisions in BITs

2.3.1 Introduction

As indicated, under this section, I will attempt to provide a general overview of the most common approaches to BIT design with regard to the regulation of transparency in dispute settlement proceedings. Initially, however, it may be useful to go into some detail on a few common characteristics of the BITs under review.

The clear majority of the BITS examined for this study feature transparency provisions in line with traditional investment treaty design, providing a list of definitions of the relevant terms and concepts, a relatively slim “catalog” of standards of protection (typically including protection from and compensation for expropriation, fair and equal treatment, national treatment, most-favored nation treatment and some others), as well as a separate part on dispute settlement, usually containing both investor-state and state-state dispute settlement mechanisms.¹²⁸ Provisions on investor-state dispute settlement commonly exhibit a modest level of detail, providing the investor with the choice between various international arbitral regimes. To varying degrees, the treaties expressly states conditions, restrictions and requirements for the submission of disputes to arbitration. Among the most common conditions are designated time periods from the time a dispute arises to when an investor may submit a dispute to arbitration and provisions establishing that the choice of dispute settlement mechanism shall be final, but other types of regulations feature as well.¹²⁹ Detailed

¹²⁸ Dolzer and Schreuer (2012) p. 13; McLachlan, Shore and Weiniger (2007) pp. 28–34.

¹²⁹ See e.g. India–Lithuania BIT (2011) article 9, paragraphs 2 and 3, Kenya–Slovakia BIT (2011) article 9, paragraphs 2 and 3, which both contain a “time period” clause and a provision on the final character of the choice of dispute settlement. Similarly, Nigeria–Turkey BIT (2011) article 11, paragraphs 2 and 3, but this treaty also denies any investor with a claim concerning “property and real rights upon the real estates” access

regulation of procedural issues, concerning the actual conduct of the arbitration, however, is less common, but does feature in some bilateral investment treaties.¹³⁰

The dispute settlement mechanisms that appear most frequently are arbitration under the ICSID convention and arbitration rules, arbitration under ICSID Additional Facility and arbitration established under UNCITRAL Arbitration rules. Among those of the examined BITs that provide for international investor-state arbitration,¹³¹ all but one¹³² grants access to arbitration under either ICSID or UNCITRAL rules. The large majority provide access to arbitration under both regimes. The choice of arbitration under other the rules of other regimes such as the International Chamber of Commerce, the Permanent Court of Arbitration, the London Court of International Arbitration and the Stockholm Chamber of Commerce are occasionally available, but explicit references to these institutions are relatively rare.¹³³ However, several treaties provide the disputing parties with the option of submitting the dispute to any arbitration institution agreed upon, or to ad-hoc tribunals established under any given arbitration rules of their choosing, or both. Indeed, as many as 36 of the examined BITs contain such options.¹³⁴ In addition, 9 treaties expressly provide national

to international arbitration, cf. paragraph 4 b). The Turkey–Kuwait BIT (2010) contains an identical provision in article 8, paragraph 4 b).

¹³⁰ See e.g. Colombia–Japan BIT article 26–41, which exhibits a high level of detail in its regulation of the arbitral process, but besides providing some transparency in relation to the non-disputing party, cf. article 32, does not touch upon transparency issues.

¹³¹ Of the total 71 bilateral investment treaties examined, only one does not provide for any sort of international arbitration, namely the Australia–New Zealand Protocol on Investment to the Australia–New Zealand Closer Economic Relations Trade Agreement (2011).

¹³² The Lebanon–Syria BIT (2010) provides for arbitration under the Arab Investment Court, cf. article 6.

¹³³ I have noticed only six explicit references to the ICC, and one each to the LCIA, the PCA and the SCC. See also Douglas (2009) pp. 5–6, with extensive references to dispute settlement alternatives in BITs.

¹³⁴ E.g. Estonia–Azerbaijan BIT (2010) article 10, paragraph 2, Egypt–Switzerland BIT (2010) article 12, paragraph 4 and Papua New Guinea–Japan article 16, paragraph 4 d). A somewhat distinct solution can be found in Colombia–UK BIT (2010), which in article IX, paragraph 4 makes the choice of arbitral regime

arbitration institutions as avenues for dispute settlement. It seems, then, that even though most investment arbitration proceedings take place under ICSID or UNCITRAL rules, the existing body of treaty materials is not characterized by lack of access to alternative arbitration systems.

When reviewing the selected treaty materials in order to assess the prevalence and contents of provisions on procedural transparency, it becomes apparent that the treaties can be roughly divided into two groups: One group consisting of treaties that feature such provisions and another which does not. In general, and for the time being ignoring the occasional treaty breaking the pattern, the lack of any middle ground is readily apparent: Transparency is either regulated in relatively high detail or not at all. What are possible explanations for these tendencies? In the following section, I will address the group of treaties lacking express regulation.

2.3.2 Group 1: No Express Regulation

This group encompasses the overwhelming majority of the BITs I have reviewed for this section. Out of the 41 BITs signed between 2010 and 2013 for which text were available,¹³⁵ as many as 36 contain no express regulation of transparency issues at all.¹³⁶ When examining the 30 treaties from the period between 2004 and 2010 which were included to supplement those from 2010 and onwards, a similar pattern emerges. 14 of the older treaties provide no regulation of procedural transparency and of the 12 that do, 9 confine themselves to expressly state that the parties together decide whether or not final awards shall be pub-

subject to party consensus, but in the case that no agreement is reached the dispute is to be submitted to arbitration under the ICSID Convention or ICSID Additional Facility Rules.

¹³⁵ Out of a total of 113 signed BITs in the designated period.

¹³⁶ The 5 treaties that do feature provisions on procedural transparency are all treaties to which Canada is party. These will be addressed in the next section.

lished. Thus, they do not increase the transparency of the proceedings at all.¹³⁷ One of the 30 treaties makes publication of final awards mandatory.¹³⁸ Merely two treaties¹³⁹ provide for more extensive transparency regulations, including open hearings and mandatory publication of procedural documents and tribunal decisions.

The impression that there is a general absence of transparency regulation in the majority of recent BITs is reinforced by the review of a number of model investment treaties which presumably provides the starting point for present investment treaty negotiations of the proprietary states. Neither the Austrian, British, Korean, Chinese, Colombian, Dutch, French, German, Italian, Korean nor Russian model treaty provide any regulation of procedural transparency issues.¹⁴⁰ Thus, all these model agreements effectively refer such issues to the disputing parties or the individual tribunal.

In addition to possibly contributing to a prolonged and increasingly contested and costly process,¹⁴¹ lack of express regulation may very well lead to different and, from the vantage point of the state party, less ideal results than if the treaty parties had been willing or able to conclude on clear and express solutions to transparency issues during the negotiating of a particular investment treaty. As respondents to potential investor claims subject to international arbitration, state parties are likely to have a common interest in specific solutions, and one would think that treaty negotiations would provide a more convenient, not to say

¹³⁷ These 9 treaties all feature Mexico as one of the parties, see next section.

¹³⁸ Mexico–Spain BIT (2006) article 16, paragraph 4.

¹³⁹ United States–Rwanda BIT (2008) and United States–Uruguay BIT (2005), see below section 2.3.3 for more on the content of these treaties.

¹⁴⁰ Commentaries on all these treaties can be found in Brown (2013).

¹⁴¹ As indicated by the several examples in case law of procedural orders dedicated solely to deciding on transparency issues. For a recent example, see *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012/12, Procedural Order No. 5 (Regarding Confidentiality), 30 November 2012 (hereinafter “*Philip Morris*, Procedural Order 5”). See also, e.g., *Abaclat*, Procedural Order 3; *Vito V. Gallo v Canada*, NAFTA Chapter 11 (UNCITRAL), Procedural Order No. 6, 30 August 2011.

predictable, avenue toward such desired solutions than an arbitral procedure in which the state's interest are pitted against those of an aggrieved investor. It follows, then, that to the extent that the treaty parties would find themselves in agreement on transparency issues, this should lead to these issues being regulated in the treaty. However, as we have seen, on a general level, this is hardly the case. The absence of transparency provisions in conventional BITs reveals an apparent lack of awareness of, or willingness to address, transparency issues on the part of the states entering into these agreements, that, in light of the criticism that has been leveled against investment treaty arbitration in recent years, is quite striking. By failing to address transparency in treaties, states miss the legitimacy gains potentially following increased public access to investment arbitration.

There are several possible explanations for the glaring absence of transparency regulation in most BITs. However, in order to prepare the ground for a discussion on this point, it is useful to first address those of the examined BITs that do in fact feature express provisions on the transparency of proceedings. Even though the criticism highlighting the lack of transparency in investment arbitration has not been able to impact the practices of most states, this does not mean there has been no impact at all. The NAFTA parties have been at the vanguard with regard to these issues also in the bilateral context. In recent years significant developments in the treaty design of certain states have taken place. These developments are the subject of the following sections.

2.3.3 Group 2: BITs Providing Procedural Transparency

Turning the attention to the other group of bilateral treaties, a radically different pattern emerges. The, admittedly few, states which have, consistently or on occasion only, opted to include provisions on procedural transparency in their BITs have, with some notable exceptions, done so in a thorough and comprehensive way. These treaties reflect a range of the

issues that have featured in investment law debate on this topic.¹⁴² Regulation commonly includes provisions on the public registration of the initiation of arbitral proceedings and detailed rules concerning document transparency, *amicus curiae* submissions, public hearings and the public availability of the final award.

The primary actors have been the member states of the NAFTA, primarily Canada and the United States. As discussed above under 2.2, the development began within that regime, and thus originates not in the context of the isolated investment treaty, but rather in the wider context of the free trade agreement.¹⁴³ However, as noted, the transparency rules developed within the context of the NAFTA have been carried over into the BIT-landscape by way of the model and specific bilateral treaties of the NAFTA-parties, mainly those of the United States and Canada. For the last 10 to 15 years, both these states have consistently included extensive provisions on procedural transparency in their bilateral treaties. In some respects, namely in the provisioning of mandatory open hearings and “prompt” publication of procedural documents, the countries have gone further than Chapter 11 tribunals and the NAFTA Free Trade Commission respectively.

In recent years, there have been signs indicating that at least some of the treaty partners of the United States and Canada have adopted their attitude on transparency in ISDS. Among the BITs concluded in between 2010 and 2013 however, there are hardly any signs of this tendency. As mentioned at the outset of section 2.3.2 above, out of the 41 of the 113 BITs signed in the period 2010–2013 which were available for review under this section, only 5

¹⁴² Langford (2013) p. 5. For examples of this comprehensive approach, see United States–Uruguay BIT (2008) article 28, paragraph 3 and article 29; Canada–Tanzania BIT (2013) articles 30 and 31. With regard to the transparency provisions in the Model BIT of the United States, see Caplan and Sharpe (2013) pp. 833–834, 837–838. For the same with regard to the Canadian model, see Lévesque and Newcombe (2013) pp. 119–121.

¹⁴³ Investment provisions in RTAs in general are discussed in section 2.4. On the different contexts of BITs and RTAs with investment chapters, see de Mestral and Falsafi (2013) pp. 115–134.

contain express provisions on transparency. All 5 have Canada as one of the parties. And among the 30 supplementary reviewed BITs, only those to which the United States is party – the BITs with Uruguay and Rwanda respectively,¹⁴⁴ – contain comprehensive transparency provisions akin to those in the Canadian treaties. These two are the only U.S. BITs concluded between 2004 and 2014, as the United States seems instead to focus on negotiating FTAs.¹⁴⁵

The comprehensive approach to transparency is exemplified by articles 38 and 39 of the Canadian model agreement.¹⁴⁶ According to the Canadian Government, the provisions in question are intended to “maximize openness and transparency in the dispute settlement process”¹⁴⁷, and the two articles does indeed provide for a very high degree of transparency in investor-state dispute settlement. By default, the treaty guarantees the public full insight into all documents pertaining to an ongoing dispute, allows for public attendance at hearings, and provides tribunals with the discretionary authority to accept *amicus curiae* submissions.

Under article 38 (1) of the model, arbitral hearings shall be open to the public. The provision is compulsory, i.e. the parties do not have the opportunity to agree on keeping the proceedings closed. However the tribunal may decide to keep “portions”, i.e. not the hearings in their entirety, closed, if the tribunal considers this to be necessary for the protection of

¹⁴⁴ U.S.–Uruguay BIT (2005), U.S.–Rwanda BIT (2008). These provisions are fully in line with the equivalent provisions in the US Model BIT. Texts available at: http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp (last accessed 20 August 2013).

¹⁴⁵ The U.S. has concluded several FTAs with investment chapters, and these generally contain the same type of transparency provisions as their BITs and the model agreement, see below under section 2.4

¹⁴⁶ See Annex 1.

¹⁴⁷ DFATD, ‘Canada's Foreign Investment Promotion and Protection Agreements (FIPAs)’, available at <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa-apie.aspx>> (last accessed 19 August 2013).

confidential information. Furthermore, the “Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the disputing parties.”¹⁴⁸ Thus far, the most common logistical arrangements of open hearings in investment arbitration have been closed-circuit televised broadcasting. Recently, however, there have also been examples of live streaming of proceedings over the internet, so-called webcasting.¹⁴⁹

Article 38 (3) and (4) concerns document transparency. Article 38 (3) provides for the publication of tribunal awards, and the public availability of “all other documents submitted to, or issued by the Tribunal”, as long as the disputing parties does not agree otherwise, and subject to the necessary protection (through redaction) of confidential information. The provision encompasses all documents submitted in the proceedings, typically from the notice of arbitration onwards. The wording excludes the written arguments of the parties, to the extent that these are not handed over to the tribunal in writing. However, transcripts of hearings, which will include the written arguments of the parties to the extent that these are presented orally during hearings, shall be issued by the tribunal.¹⁵⁰ This brings all written and oral submissions under the provision, as long as these are reproduced in some form of document. Although this is not stated outright, publication shall be prompt.¹⁵¹

The effect of article 38 (3) is to establish document transparency as the starting position with regard to in investor-state dispute settlement. While most arbitral regimes and IIAs are

¹⁴⁸ Canadian Model FIPA, Article 38 (2).

¹⁴⁹ Closed-circuit broadcasting of hearings has been conducted in many NAFTA Chapter 11 proceedings, first in the *UPS* and *Methanex* cases, and later in many others. The first arbitration featuring webcasting was *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, in May 2010. See generally Plagakis (2013) and below section 3.4.

¹⁵⁰ Levesque and Newcombe (2013) p. 119, with reference to DFATD, “Canada’s Foreign Investment Promotion and Protection Agreements (FIPAs) Negotiating Programme”.

¹⁵¹ *Ibid.*

quiet on the issue of document transparency, and consequently leave the issue to the discretion of the tribunal or the parties themselves¹⁵², the model instead expressly establishes a concrete default position, by requiring the agreement of the parties in order for the procedural documents to remain confidential. Thus, as long as only one disputing party is in favor of keeping the procedural documents out of from the public eye, these will be made publicly available. Access to agreeing on document confidentiality is limited by article 38 (4), according to which “any Tribunal Award ... shall be publicly available, subject to the deletion of confidential information.” Thus, under the model, tribunal awards, including both awards on jurisdiction and on merits, will always be made public. On the other hand, decisions and orders of the tribunal do not constitute awards and are consequently regulated by article 38 (3).

Mandatory open hearings compensate, at least to a degree, for the eventuality that the disputing parties should agree on keeping the documents of the dispute confidential. Open hearings are no fully adequate replacement however, as attendance demands that one is present at the place of arbitration, or alternatively, that the hearings are broadcasted. Given Canada’s demonstrated commitment to transparency it is not very likely that it will consent to confidentiality in many cases. However, some of Canada’s treaty partners may not share this commitment. A mandatory provision on the transparency of documents would have provided for guaranteed publication in all arbitrations under treaties to which Canada is party, regardless of whether Canada is a disputing party in the case. Nevertheless, even in the case of the parties agreeing on confidentiality, the combination of mandatory publication of awards and open hearings ensure a process with a considerably higher degree of transparency than treaties which refer all such issues to the applicable rules.

¹⁵² Cf. the notion of “no general duty of confidentiality” in investment arbitration as expressed by tribunals under ICSID, Additional Facility and UNCITRAL rules, as well as by the FTC in its Notes of Interpretation of Certain Chapter 11 Provisions. For references and discussion with regard to tribunal assessments of confidentiality in ISDS, see chapter 3.3.

Article 38 (5) and (6) concern the extent to which the disputing parties may share confidential information provided to them with their legal counsel and other persons connected to the arbitration, and, with regard to a disputing state party, officials of their respective national and sub-national governments.¹⁵³

Article 38 (7) sets out general exceptions from the duty to disclose information to the other party or to the tribunal during proceedings. Information protected from disclosure under the provision will not be disclosed at all, and there is consequently not an issue of it entering the public domain under Article 38 (3). A converse variant of this provision, Article 38 (8) regulates the relationship between the arbitral procedure and national laws on access to information with respect to document confidentiality. It provides that in the event of conflict between a Tribunal's order on confidentiality and national statutes on access to information, typically "Freedom of Information" acts, the national law shall prevail.¹⁵⁴

Article 39 and the accompanying Annex C.39 provide tribunals with the authority to accept *amicus curiae* submissions. Disregarding a few minor differences in language, the provisions are identical to the 2003 FTC Statement on Non-Disputing Party Participation, providing tribunals with the exact same guidelines and safeguarding duties with regard to the decision on whether to accept an application to submit.¹⁵⁵ Likewise, a tribunal is under no obligation to address a brief in the award or otherwise during the proceedings.¹⁵⁶ Formal and substantial requirements for the application to file submissions and the submissions themselves are set out in Annex C.39.

¹⁵³ Paragraph 6 may be viewed against the background of the decisions of the *S.D. Myers* and *Pope & Talbot* Tribunals, which restricted Canada's access to share such information with provincial and local governments. See *Pope & Talbot*, Procedural Order 5; *S.D. Myers*, Procedural Order 16.

¹⁵⁴ This is an interesting but somewhat complicated issue, and a thorough discussion would go beyond the scope of this study.

¹⁵⁵ Canadian Model FIPA, Article 39 (4) and (5).

¹⁵⁶ *Ibid.* Article 39 (7).

The United States Model BIT is akin to the Canadian model in most respects concerning procedural transparency. There are, however, a few significant differences. The most important difference is that the U.S. Model does not provide the parties with the opportunity to agree to keep procedural documents confidential, instead demanding that the disputing state “promptly transmit them to the non-disputing Party and make them available to the public”, subject to the protection of confidential information.¹⁵⁷ Hence, where the Canadian model establishes a default position of document transparency, the U.S. model provides for a mandatory arrangement. Moreover, rather than requiring the publication of “all documents submitted to, or issued by, a Tribunal”,¹⁵⁸ the U.S. model explicitly states the different categories of documents to be published.¹⁵⁹ The list comprises all the significant categories of documents, from the notice of intent to the final award. This approach arguably adds more clarity than the Canadian model, as there is no room for doubt as to which documents shall be made publicly available.

Another difference is that while the Canadian model does not provide rules on the designation of confidential information, the U.S. model contains an elaborate procedure on this point.¹⁶⁰ Finally, Article 38 (5) and (6) of the Canadian model have no equivalents in the U.S. one. With regard to *amicus curiae* submissions, the U.S. model grants tribunals a blanket authority to accept these, cf. Article 28 (3). The provision contains no guidelines or recommendations, nor does it contain formal and material requirements for applications or submission.

¹⁵⁷ U.S. Model BIT, Article 29 (1).

¹⁵⁸ Canadian Model FIPA, Article 38 (3).

¹⁵⁹ U.S. Model BIT, Article 29 (19) *litra* a–e.

¹⁶⁰ *Ibid.* Article 29 (4)

The five BITs entered into by Canada in the period 2010–2013 contain identical or very similar transparency provisions to those of the model agreement.¹⁶¹ Notwithstanding the differences that have already been noted, so does the U.S. Model BIT and the U.S. BITs with Uruguay and Rwanda. An exception should be made with regard to the treaty with China, which features a modification that shifts the balance of power sharply in favor of the state disputing party. This modification warrants some discussion.

The Canada–China FIPA, signed 2012, in article 28, paragraphs 1 and 2, leaves the issues of document transparency (excluding the question regarding the publication of final awards, which are always published under the treaty) and open hearings to be decided by the state party to the dispute alone. If said party “determines that it is in the public interest to do so and notifies the Tribunal of that determination”¹⁶², it may decide that hearings shall be open and that documents submitted to, or issued by, the tribunal shall be made publicly available. With regard to the issue of public hearings, the disputing investor must also be consulted.¹⁶³ The decision, however, is the state party’s alone. What this provision does, essentially, is it leaves the central transparency issues solely in the hands of the state party to the dispute. As such, it departs significantly from article 38 of the Canadian model. Leaving the issue of document transparency up to the state disputing party alone may potentially create an imbalance in the arbitration. A tribunal will have no way of reviewing the “determination” of the disputing state with regard to public interest in the dispute. A consequence might be that investors during the proceedings will have to conform to the fact that documents may be published at any given time, if the disputing party so sees fit. As such, the provision potentially constitutes a weapon for the state party. While not neces-

¹⁶¹ The treaties exhibit differences in the level of detail, mainly on the procedure and formal and qualitative requirements for *amicus curiae* submissions. See Canada–China BIT (2012) Articles 28 and 29, and Annex C-29, Canada–Slovakia BIT (2010) Annex B, parts I, III and IV, Canada–Tanzania BIT (2013) articles 30 and 31, Canada–Kuwait (2011) Articles 30 and 31, and Canada–Benin BIT (2013), Articles 33 and 34.

¹⁶² Canada–China FIPA Article 28, paragraphs 1 and 2.

¹⁶³ Ibid. paragraph 2.

sarily constituting a threat to the proceedings – as in a mandatory regime parties would have had to relate to transparency as a matter of course – the provision nevertheless creates an element of unpredictability which would not have been present with a mandatory provision.

It is probably safe to assume that the relative power of China, as well as the prestige and importance associated with the conclusion of the treaty, are central factors in explaining why Canada was willing to break a pattern it has consistently applied in its recent agreements.¹⁶⁴ Indeed, China's default position seems to be to have no regulation of transparency issues at all in its investment agreements. As already noted, the China Model BIT from 2003 contains no provision on such issues¹⁶⁵, and the only mentioning of any transparency-related issue in the three other Chinese BITs examined for this chapter, the China–Colombia BIT, the China–Russia BIT and the China–Mexico BIT, can be found in Article 20 (4) in the agreement with Mexico, which provides that final awards shall be made public, unless the parties otherwise agree.¹⁶⁶

¹⁶⁴ Similarly, Saulino (2012) p. 13.

¹⁶⁵ On the Chinese Model BIT, see Shan and Gallagher (2013). The commentary does not touch upon issues pertaining to procedural transparency.

¹⁶⁶ The dispute settlement mechanism of this treaty is considered to be based more on NAFTA Chapter 11 than the Chinese model, see Shan and Gallagher (2013) p. 174. Regrettably, none of the four other BITs entered into by China in the designated time period were available. Based on the modest transparency regulation in Article 20 (4) of the treaty with Mexico, which is in line with Mexico's obligations under NAFTA Article 1137, and the lack of any express regulation in the Colombia–China BIT and the China–Russia BIT, it would be surprising if China's unpublished treaties (with the Democratic Republic of Congo, Chad, Libya and Uzbekistan) from the period 2010–2013 contain extensive provisions on transparency.

Kuwait, Slovakia, Benin and Tanzania, i.e. the other states with which Canada concluded BITs in the designated time period, all concluded BITs with other states during this time.¹⁶⁷ However, out of those treaties for which text is available, none contains express provisions on procedural transparency. Rather, these treaties place themselves firmly in the “conventional” camp. This finding further strengthens the image of the development in treaty design with regard to procedural transparency as being a phenomenon primarily encouraged and put on the agenda by the United States and Canada.

Mexico, itself party to the highly transparent NAFTA-regime, has largely failed to provide extensive transparency in its BITs. In addition to the abovementioned treaty with China, Mexico entered into ten BITs between 2005 and 2009 (but none after), out of which text is available for nine¹⁶⁸. None of the available treaties contains any express regulation of procedural transparency beyond simple provisions concerning the conditions for publication of final awards. Publication is usually subject to the agreement between the disputing parties, though whether the treaties establish publication or confidentiality as default position varies¹⁶⁹. The only treaty providing for the mandatory publication of final awards is the Mexico–Spain BIT (2006), cf. article 16, paragraph 4. Compared to the broad and nuanced regulation that characterizes the treaties of the United States and Canada, the Mexican approach as expressed in its BITs is not very convincing, and does not indicate that transparency is

¹⁶⁷ The treaties for which text is available are Kuwait–Turkey BIT (2010), Kuwait–Pakistan BIT (2011), Kuwait–Czech Republic (2010 – Amendment Protocol), Tanzania–Turkey BIT (2011) and Slovakia–Kenya BIT (2011).

¹⁶⁸ The Mexico–Singapore BIT (2009) was not available through the database of UNCTAD.

¹⁶⁹ See Mexico–UK BIT (2006) article 18, paragraph 4, Mexico–Iceland BIT (2005) article 17, paragraph 4, Mexico–Australia BIT (2005) article 19, paragraph 4 (the treaty uses the word “decision”, not award), Mexico–India BIT (2007) article 19, paragraph 4, Mexico–Panama BIT (2007) article 20, paragraph 4, Mexico–Slovakia BIT (2007) article 20, paragraph 4, Mexico–Trinidad & Tobago BIT (2006), article 20, paragraph 4, Mexico–Belarus (2008) article 20, paragraph 4. The treaties with the UK, India, Panama, Slovakia, Trinidad & Tobago and Belarus, as well as the treaty with China, all require final awards to be published unless the parties otherwise agree. Mexico’s treaties with Iceland and Australia establish the opposite starting position.

considered an important policy issue. Through the (potential) publication only of final awards, transparency is granted only after the conclusion of proceedings, which reduces the chances of public and third-party interest or participation. Although not totally dismissive of procedural transparency, Mexico's BITs signal not much more than a weak middle position.

2.3.4 BITs and Pieces: Discussion.

The differences between treaties providing for transparent dispute settlement and treaties which are silent on these issues are quite striking. What are possible explanations for the widespread lack of express transparency regulation in recent BITs? What are the driving forces behind the approach of those states which do favor transparency of proceedings? If such driving forces can be identified, why do these not influence the approach of other states?

Absence of provisions on procedural transparency is in line with the traditional BIT-design outlined above.¹⁷⁰ Conversely, treaties which do provide express regulation of procedural transparency issues usually also exhibit a more detailed dispute settlement process in general.¹⁷¹ As such, these treaties can perhaps be seen as expressions of a desire and ability on the part of the negotiating parties, or at least the dominant party, to reflect upon and regulate the different phases and aspects of the dispute settlement process in more depth. Compared to these more comprehensive treaties, the traditional BIT appears quite modest, to put it mildly.

¹⁷⁰ UNCTAD (2012), p. 36.

¹⁷¹ Compare, e.g., the U.S.–Uruguay BIT (2008) and the Switzerland–Trinidad and Tobago BIT (2010). The former treaty comprises 37 articles, 8 annexes and a protocol. 14 articles concern investor-state dispute settlement. The Switzerland–Trinidad and Tobago treaty comprises only 11 articles, and only one concerning investment disputes.

The silence of most recent BITs might be at least partly explained by adapting a historical perspective. Historically, as is well known, BITs were negotiated primarily between capital exporting and capital importing states,¹⁷² and often concluded in haste and on the basis of “boiler-plate” texts, prepared in advance by the capital exporting party.¹⁷³ Transparency of proceedings was not an issue in these treaties. This raises the question of whether the continuing failure of the large majority of states to regulate the transparency of arbitral proceedings is a remnant of the historical system, i.e. an effect of states being somewhat fastened in the traditional form of the BIT.

The short and concise form of the traditionally designed BIT does not provide an ideal structure for detailed regulation of the finer points of the arbitration procedure, such as transparency issues. As noted, there is usually not much regulation of procedural issues at all. Thus, going into treaty-negotiations, a certain initiative or determination is perhaps required in order to break the mould. However, any initiative would presuppose an awareness or interest with regard to transparency issues among negotiators. In the absence of such factors, the traditional treaty form in itself will likely work against the expansion of procedural regulation. It seems then, that as long as negotiating parties are not willing or able to reflect on and confront the form of treaties and the connection between the treaties and the arbitral procedure with regard to the possibilities of fine-tuning procedural issues, one will probably continue to see the same slim treaty documents that we have seen dominating the majority of the body of recent BITs.

Some signs indicate that the traditional pattern with regard to BIT design might be breaking. Increasingly, early BITs are renegotiated, and many of these renegotiated treaties come equipped with more elaborate investor-state dispute settlement mechanisms, as well as oth-

¹⁷² See, e.g., Echandi (2011) p. 3.

¹⁷³ Maupin (2013) p. 151–152.

er alterations.¹⁷⁴ There are several reasons for this development. Some states seek to strengthen investment protection standards; others seek a balancing of the states' interests as prospective respondent and the interest in establishing a functioning investment protection regime.¹⁷⁵ With regard to such a shift towards "balance" as an aim, several states have reviewed their investment treaty programs and models with a view to improve their treaties in this respect.¹⁷⁶ The aim has been "to ensure consistency with the public interest, adjust the old model to new developments, and seek a 'balance between protecting investor and host country'."¹⁷⁷ Increased transparency of proceedings would seem to fall well in line with these aims. However, against the background of the BITs reviewed for this study, any such changes in policy aims do not seem to have had much of an effect with respect to the regulation of the transparency of investor-state dispute settlement. Even those of the examined treaties which contain more elaborate dispute settlement provisions or are less traditional by design do not touch upon procedural transparency at all.¹⁷⁸ If anything, this indicates that for most states, procedural transparency is neither considered a pressing issue in negotiations nor something that needs to be addressed as part of a balanced approach to BITs. It seems then, that while states to different degrees are conscious of the need to modernize their treaties, there seems to be little support for concluding that transparency in dispute settlement is a notable concern.

It is conceivable that the majority of states are of the opinion that procedural transparency issues best belong under the different applicable rules, or that procedural transparency is

¹⁷⁴ Newcombe (2013) p. 22.

¹⁷⁵ Ibid. p. 23.

¹⁷⁶ Alvarez (2011) p. 238, with references.

¹⁷⁷ Ibid.

¹⁷⁸ See, e.g., the Egypt-Switzerland BIT (2010), Article 12; Colombia – Japan (2011), Articles 26–41; Japan–Iraq (2012), Article 17; Japan–Papua New Guinea (2011), Article 16. Note that all three Japanese agreements contain provisions on the rights of the non-disputing treaty party with regard to notice, access to procedural documents and submissions on interpretation.

considered an unimportant issue per se. This is clearly not an opinion shared by all investment-treaty concluding states, as evidenced by the U.S. and Canadian treaties already discussed, and the way transparency has been a point of contestation in many arbitral proceedings.¹⁷⁹ However, despite the widespread criticism, it is a possibility that states themselves do not really consider increasing the transparency of investment arbitration an important aim. Indeed, one may argue that because a lack of publicly available information pertaining to investment disputes is likely to constitute an effective barrier to public discussion and pressure from civil society, it is not out of the question that a state may consider lack of transparency an advantage. This may especially be a concern in cases where negotiated settlement is a possible outcome. The political costs of lost cases and expensive settlements will likely be less damaging if a dispute is not well known in the public sphere. However, states actively avoiding the inclusion of transparency provisions in their BITs are not likely to admit that this is the case. On the other hand, lack of public discussion not only relieves the state from public pressure, but the investor as well. And a foreign investor will often have a considerably more vulnerable public image than the host state, a fact the state may wish to take advantage of. In that respect, express provisions increasing the transparency of arbitration proceedings could potentially constitute a tool for the disputing state against the investor, as public documents and information may be utilized in public discussion, typically through the media.¹⁸⁰ From the perspective of states as both negotiating and disputing parties, this argument constitutes another point in favor of express transparency provisions in BITs.

¹⁷⁹ See the relevant case law discussed in section 3.3.

¹⁸⁰ Such media tactics was subject to tribunal scrutiny in the well-known *Biwater Gauff*-case. During the proceedings the tribunal, operating under ICSID rules, issued a procedural order restricting the access of the parties to publicly disclose information pertaining to the dispute. Tanzania had previously published the Minutes of the First Session of the Arbitral Tribunal online. Had the treaty providing the basis for the dispute contained an express right to make procedural documents public, and as such modified the applicable rules, the tribunal could not have issued such an order. See *Biwater Gauff*, Procedural Order 3, and below chapter 3.4.

Turning to the few BITs which contain express and comprehensive provisions on procedural transparency, namely the seven recent U.S. and Canadian BITs, it is necessary to address the “driving forces” behind these states’ adherence to transparent proceedings. As was discussed at length in section 2.2 above, the developments within the NAFTA, together with clear unilateral policy in favour of increased transparency, led to the adoption of revised model treaties in 2004. Perhaps the clearest example of a general commitment towards transparency as a policy issue is the United States Trade Act of 2002, which, as we recall, referred explicitly to transparency in investor-state dispute settlement.¹⁸¹ A wish to adhere to national access to information laws has been another significant factor.¹⁸² These developments constitute the primary explanations for the current design of U.S. and Canadian BITs. Combined, the elements create an impression of a significant commitment to procedural transparency in Canada and the U.S.

It is possible to place the U.S. and Canadian positions on transparency in the context of a supposed reorientation of investment treaties in the direction of a more balanced approach with regard to state and investor interests.¹⁸³ While it is not necessarily correct to consider procedural transparency an issue concerning the relationship between investor and state per se, increased regulation of the arbitral procedure may be considered an obstacle by investors.¹⁸⁴ To the extent that a state is interested in weakening incentives to arbitration, increased mandatory transparency may constitute one of a number of instruments for this purpose.

Comparing the “silent” BITs with the seven U.S. and Canadian agreements which do provide comprehensive transparency provisions highlight the “pro-active” nature of the latter

¹⁸¹ See Trade Act of 2002, Pub. L. 107–210, 116 Stat. 933, sec. 2102(b)(3)(H).

¹⁸² Bjorklund (2013) p. 507.

¹⁸³ On this approach in general, see Alvarez (2010); Alvarez (2011).

¹⁸⁴ Alvarez (2010) p. 10.

with regard to the procedural issues that potentially surface over the course of a given arbitration: As states during treaty negotiations might take on and arrive at mandatory solutions to fundamental transparency issues before the conclusion of the treaty, they avoid having to subject themselves to the discretionary judgment of an arbitral tribunal in the case such issues should arise during proceedings. The treaty will provide the answer.¹⁸⁵ In the midst of a dispute, things are rarely so simple. Considering that a tribunal in its administration of the arbitral proceedings has an obligation to respect and balance the interests of both parties to the dispute¹⁸⁶, a state party might find it difficult to push through its desired solution to the issue at hand. During the negotiation of a bilateral treaty, on the other hand, there is no present and concrete investor interest that demands to be taken into account. Obviously, a state instead faces other constraints, primarily the negotiating power and leverage of the other party. Nevertheless, it does seem fairly obvious that states find themselves significantly less constrained by external forces with regard to working out preferred solutions to a given issue than when they face similar issues in the midst of arbitral proceedings. Furthermore, the express regulation of procedural transparency issues in treaty texts would contribute to both increased predictability and possibly lower financial and temporal costs in connection with dispute settlement, as less time will have to be spent on procedural arrangements pertaining to transparency. These improvements, together with the potentially heightened legitimacy of a more transparent system, seem to be the primary gains of including in treaties comprehensive solutions to procedural transparency issues. Potentially, the nature of these gains is simultaneously legal-technical (less extensive, complex and resource-intensive dispute settlement) and normative (increased legitimacy following greater transparency).

¹⁸⁵ Conditional upon the relevant provisions being sufficiently clear.

¹⁸⁶ Reflected in most of the arbitration rules commonly applied to investment disputes, see e.g., UNCITRAL Rule 17 (1): “[T]he arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality ... The arbitral tribunal, in exercising its discretion, shall ... provide a fair and efficient process.”

Based on the selection of BITs examined for this chapter, there is not much pointing in the direction of a radical shift in state practice with regard to the inclusion of transparency provisions in investment treaties. Rather, the picture painted by the body of recently concluded BITs rather seems to point in the other direction, with only Canada and the United States consistently including detailed regulation of the transparency of arbitral proceedings, Mexico taking a weak middle position, and the large majority of states steering clear of any transparency regulation at all. However, to conclude on the basis of BITs only would ignore the increasing tendency to include investment chapters in FTAs. Surveying the investment chapters of the many FTAs concluded over the last 10 to 15 years provide important nuances and significant supplements to the findings discussed in this section. Indeed, the agreements reveal what may constitute certain regional developments with regard to procedural transparency in investment arbitration. The following section will examine these materials.

2.4 Investment chapters in “other IIAs”

2.4.1 Introduction

Economic globalization is fueled by the liberalization and coordination of international trade and increasing levels of foreign direct investment.¹⁸⁷ Constituting the tools of the trade, international trade agreements are an essential component of the global economy. Since the 1990s, the global body of RTAs has been growing steadily.¹⁸⁸ An increasing number of such treaties contain specific chapters on investment promotion and protection, many including mechanisms for ISDS. By design, these investment chapters commonly appear quite like BITs, including the same type of standards of protection and the same mechanisms for international arbitration. For this section I have examined all the agree-

¹⁸⁷ van den Bossche (2008) p.2.

¹⁸⁸ World Trade Organization, Regional Trade Agreements: Facts and Figures. Available at http://www.wto.org/english/tratop_e/region_e/regfac_e.htm (last accessed 29. August 2013).

ments listed as in force in the “Regional Trade Agreements”-database of the WTO.¹⁸⁹ In addition to conventional bilateral and regional free trade agreements, the database encompasses other treaty types, such as partial scope agreements, framework agreements and basic customs unions. Comprehensive investment chapters rarely feature in non-BIT IIAs other than FTAs/RFTAs.¹⁹⁰ Some treaties provide limited investment protection such as provisions on pre-establishment and capital movements;¹⁹¹ others make investment protection and promotion an issue of future cooperation and negotiation¹⁹². The treaties subject to discussion in the present section is what is usually referred to as trade and investment agreements (“TIAs”). These are treaties “that include investment chapters or provisions but do not include agreements that refer solely to future negotiations or cooperation as to investment.”¹⁹³ However, TIAs that do not feature mechanisms for investor-state dispute settlement generally fall outside the scope of the issues at hand. It is the dispute settlement mechanism that is under scrutiny.

The object of the present and following sections is to assess whether an examination of the body of relevant TIAs alters the impression created by the examination of BITs in the preceding section with regard to the prevalence and design of express provisions on procedural transparency in investment agreements. This is primarily an empirical question, concerning the prevalence and characteristics of provisions on procedural transparency in these treaties. However, there is also a broader issue of the nature and context of TIAs as opposed to

¹⁸⁹ Available at: <http://rtais.wto.org/UI/PublicAllRTAList.aspx> (treaties reviewed July–August 2013).

¹⁹⁰ An important exception is the Energy Charter Treaty (ECT), which should not be characterized as a strict trade agreement.

¹⁹¹ See the majority of the EUs agreements with third countries.

¹⁹² E.g. Chile – Malaysia FTA (2012) article 14, paragraph 5 (establishing a future negotiating mandate) and Turkey – Albania FTA (2003) article 13. Japan – Philippines FTA/EIA (2008) does provide an investment protection chapter, but makes ISDS a subject for future negotiations, cf. article 107. With regard to the differentiation between levels of regulation in treaties, see, UNCTAD, *World Investment Report 2013* (2013), pp. 101–102.

¹⁹³ De Mestral and Falsafi (2013) p. 116.

BITs. To the extent that the two treaty types differ on the regulation of transparency in investment disputes, are there significant differences between them which contribute to explain any such differences? Both issues will be addressed in the following; the former will dominate the two following sections, while the latter will resurface in section 2.4.4.

Out of the total 230 TIAs examined for this section, 78 contain comprehensive investment protection chapters, including mechanisms for ISDS, or a catalog of investment protection provisions equivalent to those found in regular BITs.¹⁹⁴ The dispute settlement mechanisms available to investors by and large follow the pattern of BITs, i.e. ICSID, ICSID Additional Facility and UNCITRAL, with some treaties opening for other regimes if agreed upon. Express recourse to other arbitral regimes is rare.

At the outset of this section, an interesting observation is the evening out of the balance between the number of agreements containing express provisions and the ones which do not. Out of the 78 relevant agreements, as many as 39 contain express provisions on the transparency of arbitral proceedings. This number is significantly higher than the number of BITs featuring similar provisions. The corresponding numbers of BITs were 7 out of 71. On closer inspection, the details of the agreements reviewed disclose that the United States and Canada exhibit the same great enthusiasm for a high degree of transparency in investor-state arbitration in their FTAs as they do in their BITs. In reality, of course, the isolated issue of investment protection is exactly the same in both contexts, and policy positions are likely to be similar. Therefore, there is no surprise to discover that transparency provisions in the FTAs of the two countries are identical or highly similar to those in their models agreements and BITs. However, Canada and the United States are merely party to 21 of the FTAs under review, and only 14 of these contain express provisions on transparency.¹⁹⁵

¹⁹⁴ A few treaties lack investment chapters, but make explicit reference to BITs in force between the parties. These treaties are included among the 78.

¹⁹⁵ The treaties which do not are either from the period before transparency issues were brought to the fore, e.g. Canada-Costa Rica FTA (signed early 2001, in force 2002), do not offer substantial investment protection

When looking at the total of the available FTAs, a more widespread tendency of regulating procedural transparency than that indicated by the examination of BITs can be observed. Simply put, the FTAs show that more countries than the NAFTA parties regulate the transparency of investment arbitration. In light of these findings, Canada and the United States might be seen as instigators rather than isolated advocates of the transparency evolution. The extent of their influence will be assessed in the following section.

In contrast to the preceding section, I have chosen to start this section with treaties featuring express transparency provisions. The reason is a wish to attempt to trace the influence of the United States and Canada. How far does it reach? Where does it stop? This entails a stronger regional perspective than in the section on BITs. To best express the regional tendency, I will start where it has been most pronounced.

2.4.2 “The New World” – Procedural Transparency in the TIAs of the Americas

The earliest example of comprehensive provisions on procedural transparency in investment agreements, both BITs and TIAs, known to this writer is the United States-Chile FTA, signed in June 2003 and in force January 2004.¹⁹⁶ Tellingly, this treaty was signed the same year as the United States revised its Model Treaty to reflect the transparency development that had at the time recently taken place within the NAFTA.

or investment dispute settlement provisions, e.g. United States-Israel FTA (in force 1985), or they provide investment protection through reference to older BITs still in force which do not contain provisions on transparency, e.g. United States-Bahrain FTA (in force 2009, makes reference to BIT from 1999).

¹⁹⁶ See Gantz (2003) for an overview of the evolution of United States FTAs as expressed in this and the United States-Singapore FTA (in force 2004). The United States-Chile FTA predates the United States BIT with Uruguay from 2005, as well as all of Canada’s treaties containing similar transparency provisions. However, the United States-Singapore FTA was signed the same year as the treaty with Chile and contains similar transparency provisions. This treaty will be discussed in connection with the noticeable absence of similar provisions in Singapore’s other FTAs, see below.

The treaty offers investment protection in chapter 10, section B of which provides mechanisms for investor-state dispute settlement. The treaty covers the same basic transparency issues as the US (and Canadian¹⁹⁷) models and BITs, i.e. providing for mandatory document transparency and open hearings, both subject to the protection of confidential information, as well as vesting in tribunals the authority to allow for *amicus curiae* submissions.¹⁹⁸ There is nothing in the section on investor-state dispute settlement that reflects its placement in a comprehensive free trade agreement as compared to a basic investment treaty. The agreement is fully in line with the 2004 and 2012 American model agreements on this point.

The United States-Chile FTA is only the first in a relatively long line of TIAs concluded between 2004 and 2013 that contains investment chapters with comprehensive procedural transparency provisions. Reviewing these treaties reveal transparency in ISDS to be a primarily American phenomenon, with express regulation increasingly common in many treaties involving Central and South American states. Certain states have played important roles in this development, with the United States, and to a lesser extent Canada, responsible for dispersing transparency regulation southwards through their treaties. In addition to Chile, both Colombia and Peru have relatively consistently included transparency regulation of the NAFTA variety in their treaties concluded over the course of the last ten years, at least when restricting ones' perspective to those of their treaties concluded with other American states.¹⁹⁹ That all three of these states have done so after first having concluded

¹⁹⁷ Notwithstanding the option to agree on document confidentiality, as provided by the Canadian treaties.

¹⁹⁸ Cf. Articles 10.19 paragraph 3 (on *amicus*) and 10.20.

¹⁹⁹ As of 2013, Peru has concluded 11 FTAs, and 5 of these, all with parties from the Americas, contain transparency provisions similar or identical to article 10.19 and 10.20 of the United States–Chile FTA, see Peru–United States FTA (2009) articles 10.20 (3) and 10.21, Peru–Panama FTA (2012) articles 12.21, paragraph 2 and 12.22, Peru–Chile FTA (2009) articles 11.20, paragraph 3 and 11.21, Peru–Canada FTA (2009) articles 830 and 831, Peru–Costa Rica FTA (2013) articles 12.21 paragraph 2 and 12.24. In addition, the Peru–Mexico FTA (2012) provides somewhat weaker transparency regulation, providing both parties with a

FTAs with the United States, is neither a coincidence nor a surprise, given the U.S. position on procedural transparency.

Colombia has recently been highlighted as one of the modifying forces of the investment arbitration system²⁰⁰ and an examination of the country's recent investment agreements with other Latin-American states support such a claim. Of the five²⁰¹ relevant Colombian FTAs reviewed for this section, all but one contains the same broad range of transparency provisions as we have seen in US and Canadian treaties.²⁰² For instance, Colombia's FTA with Chile is testament to both states' commitment to raising the transparency standards of investor-state dispute settlement also in the absence of direct U.S. influence and pressure. The same can be said with regard to the Colombia–Northern Triangle FTA.²⁰³

right to make documents public. See articles 11.31, paragraph and 11.34. On Peru's other FTAs see below under 2.4.2.

²⁰⁰ UNCTAD (2013), p. 113, footnote 82.

²⁰¹ I consider the Colombia–Northern Triangle FTA (in force 2009) to be a single agreement, between Colombia on the one hand, and El Salvador, Guatemala and Honduras on the other.

²⁰² The five treaties are: Colombia–Mexico FTA (1995), Colombia–United States FTA (signed 2006, in force 2012), Colombia–Canada FTA (2011), Colombia–Chile FTA (2009) and Colombia–Northern Triangle FTA (2009). The 1995-treaty with Mexico, unsurprisingly, is silent on transparency issues. As we recall, as early as 1995 procedural transparency had not yet become a contested issue among the investment law community. The Colombia–EFTA FTA (2011) does not contain investment protection or dispute settlement relevant for this paper. It is worth noting that when it comes to document transparency, Colombia generally opts for the mandatory publication clause identical to the one featured in the treaties of the United States, see Colombia–United States FTA, Article 10.21 (1), Colombia–Chile FTA, Article 9.21 (1), Colombia–Northern Triangle FTA, Article 12.24, (1), cf. U.S. Model BIT, Article 29 (1). The only exception is the Colombia–Canada FTA, which gives the parties the opportunity of agreeing to keep procedural documents (excluding final awards) confidential. As we recall, this is in line with Canadian policy. See Colombia–Canada FTA, Article 830 (1).

²⁰³ Colombia–Northern Triangle FTA, Articles 12.23 (3), 12.24. The countries constituting the Northern Triangle were at this point already party to the Central America–Dominican Republic–United States FTA (in force 2006), which provides for extensive transparency in line with the U.S. model, see the following paragraph.

The consistent approach of Colombia with regard to regulating the transparency of ISDS in its FTAs is only one of a growing number of examples of the increasing adherence and loyalty to transparency standards with regard to ISDS in treaties involving Latin-American countries. In addition to the countries already mentioned, the Central American states of Costa Rica and Nicaragua have both entered into treaties containing similar transparency provisions as the other states in the region.²⁰⁴ A key document in this regard is the Central America-Dominican Republic-United States FTA (“CAFTA-DR”), signed 2004 and in force 2006. CAFTA-DR is the first treaty involving Central American parties that features the type of transparency provisions known from the NAFTA regime. This treaty, the Colombia–United States FTA and the Chile–United States FTA are the first treaties involving Latin American countries expressing a desire to open up the arbitral process, and should be considered the foundational documents with regard to extending “NAFTA-transparency” to Latin America.

The enthusiastic approach of American countries to transparency in ISDS in the years following the United States-Chile FTA has been consistent, with two exceptions. As we recall from the preceding section, the BITs of Mexico do not provide for the same level of transparency in arbitration as the two other North American states, and the same skepticism or restraint can be observed in Mexican TIAs. The practice of avoiding extensive and mandatory provisions on transparency issues is sustained throughout Mexican treaties both with countries from the Americas and with countries from other regions.²⁰⁵ However, when at-

²⁰⁴ In addition to the CAFTA–DR FTA, see the Costa Rica–Peru FTA (in force 2013), Article, and the Nicaragua–Taiwan FTA (in force 2008), Articles 10.20 (2) and 10.21. Interestingly, the Panama–Central America FTA (in force 2008) does not feature these broad transparency provisions. See more on this treaty below.

²⁰⁵ Mexico is party to 9 TIAs (excluding FTAs with Israel and EFTA because of lack of relevant investment regulation and dispute settlement), and none of these feature the broad provisions known from the treaties of the United States, Canada and most Central and South American countries. At best, Mexican treaties provide the disputing party with the authority to make procedural documents public, see discussion in next paragraph

tempting to make viable assumptions regarding Mexican policy in relation to procedural transparency, it is important to keep in mind the time most of these agreements were concluded. Mexico has been concluding FTAs since around the time NAFTA went into force, and all but two of its 9 TIAs went into force prior to 2004. As we recall, one did not observe express treaty regulation of the full range of procedural transparency issues until around 2004. Against this background, the generally consistent tendency of Mexican treaties to limit transparency regulation to the issue of publication of awards is unsurprising, as it reflects the common approach to the issues at that juncture in time.

There have been some signs of a development in Mexican TIAs in the years after 2004, but no apparent dedication to openness and transparency in general. The two most recent of Mexico's TIAs, the FTAs with Japan and Peru, both expressly provide either disputing party with the authority to publish procedural documents. However, this is a purely discretionary power;²⁰⁶ the treaty establishes no default position of transparency. As such, it is fundamentally different from the mandatory publication clauses known from other American treaties. Nevertheless, although modest, the provisions signify a possible shift towards increased transparency. However, the assumption of such a shift seems difficult to reconcile with transparency regulation in Mexico's recent BITs. As we recall, these treaties consistently concern themselves only with the publication of final awards. With regard to the treaty with Peru, in light of Peru's general positive attitude to transparency in ISDS, one might speculate that its relative openness with regard to document transparency may have come as a result of Peruvian pressure. But the similar provision in the earlier treaty with

on Mexico's FTAs with Peru and Japan. 7 treaties either makes publication of final awards conditional upon party agreement, or refer the issue to be resolved by the applicable arbitration rules.

²⁰⁶ See Mexico–Japan FTA (in force 2005), Article 94 (4): “Either disputing party may make available to the public in a timely manner all documents, including an award, submitted to, or issued by, a Tribunal established under this Section”. The Mexico–Peru FTA (in force 2012), Article 11.34 (1) contains the same provision. In addition, article 11.31 provides that final awards shall be made public unless the parties otherwise agree.

Japan can probably not be explained based on such a rationale. Japan does not regulate procedural transparency in any of its other IIAs. Against this background, the two treaties constitute interesting outliers among Mexican TIAs.

The other exception, less explicit perhaps, to the emerging American “continental consensus” on procedural transparency is the treaties of Panama. Panama initially seemed reluctant to include the same broad provisions as those featured in treaties of Colombia, Peru and the Central American states, as evidenced by its FTA with Chile, which does not touch upon transparency issues.²⁰⁷ The treaty was concluded two years after the Chile-United States FTA and around the same time as the conclusion of the Australia–Chile FTA, both of which feature very broad transparency provisions.²⁰⁸ The Panama–Central America FTA, in force 2008, is similarly limited with regard to transparency, the only provision on the subject making the publication of final awards conditional upon agreement between the disputing parties.²⁰⁹

Panama’s recent treaties with countries hailing from its home region indicate a change in attitude. The Panama-Peru FTA (in force 2012), the Panama–United States FTA (in force 2012) and the Panama–Canada FTA (in force 2013) all provide the level of transparency common in post-2004 treaties from the region. Whether the provisions of these three agreements are testament to a profound shift in favor of increased transparency on the part of Panamanian negotiators and policy makers, or just a result of the imbalances in bargaining power in the context of the specific negotiations, is of course not entirely clear. It is very unlikely that Panama would resist U.S. and Canadian priorities on this point. On the other hand, the differences in bargaining power between Chile and Peru are probably not too significant, and if Panama was able to keep transparency regulation out of its treaty

²⁰⁷ Panama–Chile FTA (signed 2006, in force 2008) provides investment protection by reference to the Panama–Chile BIT from 1996. This latter treaty is silent with regard to procedural transparency issues.

²⁰⁸ Australia–Chile FTA (in force 2009), Articles 10.20 (2) and 10.22.

²⁰⁹ Article 10.38 (4).

with Chile, why should it not be able to achieve this in its negotiations with Peru? A possible explanation could be that the emerging regional consensus has strengthened in the years between the conclusion of the treaty with Chile and the treaty with Peru, to the extent that this development has now been accepted by Panama. Another possible explanation is that the apparent change in attitude on transparency reflects a more profound policy shift among Panamanian treaty-makers, similar to that which took place in Canada and the United States 10 years ago. A third explanation may be that transparency, for whatever reason, was not an issue during the negotiation of the two earlier FTAs. If neither negotiating party considers procedural transparency an important issue, it is more likely to be left out of the treaty, especially if such issues are not regulated in models²¹⁰ or other frameworks providing the basis for negotiations. Despite the strong transparency provisions in several of the other TIAs of Chile and the Central American states, it is possible that the issue was not on the table during negotiations with Panama.

To sum up, there is a distinct and consistent tendency among Latin-American states to adopt the same kind of transparency provisions that have been a fixture of Canadian and U.S. investment treaties since the model agreement revisions of 2004 in TIAs with other Latin-American states. With the exception of Mexico, which still seems not to have a consistent policy in this regard – most often limiting regulation of transparency to provisions concerning the publication of final awards,²¹¹ the conditions for differ somewhat across its treaties – it seems safe to conclude that a consensus supporting procedural transparency in investment arbitration has been established among Latin-American states.

2.4.3 "The Real World" – No global development?

When reviewing the body of TIAs subject to this study and the extent to which these feature provisions on procedural transparency of the arbitral procedure, one is struck by a surprisingly distinct geographical pattern. The consistent support for transparency described in

²¹⁰ I am not aware of any Panamanian, Peruvian or Chilean model BITs.

²¹¹ With the exception of the already discussed FTA with Peru.

the preceding section, when taking a global view, appears to be restricted primarily to the Americas. Of the 39 TIAs reviewed containing express provisions on transparency in ISDS, 21 have both parties belonging to either North or South America, while 12 treaties have one of the parties hailing from the region. Finally, a modest 6 have both parties belonging to other parts of the world. In the following, I will take a closer look at the particulars of this apparent pattern, in order to try to substantiate upon what I view as distinct regional tendencies with regard to attitude and approach to procedural transparency in investment arbitration. As the treaties to which both parties hail from the Americas have already been discussed in the preceding section, the focus in the present section will be on the other two constellations.

The established impression of the success of the United States and Canada with regard to the inclusion of comprehensive transparency provisions in their investment treaties is further strengthened when examining the two state's agreements with states outside the Americas. Of the 12 agreements containing express transparency provisions concluded by one country from the American continents and one from another region, 5 have the United States or Canada as one of the parties.²¹² That the United States and Canada have sufficient bargaining power to push through their desired regulations in negotiations is no surprise.²¹³ In addition, the abovementioned Mexico–Japan FTA provide for the possibility of making all documents public.

When looking at the way procedural transparency is regulated in Latin-American countries' TIAs with non-American parties, the absence of comprehensive provisions on procedural

²¹² See U.S.–Republic of Korea FTA (in force 2012), U.S.–Oman FTA (in force 2009), U.S.–Morocco FTA (in force 2006) and U.S.–Singapore FTA (in force 2004). The Canada–Jordan FTA (in force 2012) does not contain a separate investment chapter, but references the 2009-BIT between the two states, which provide procedural transparency in line with the Canadian Model FIPA.

²¹³ Although there is at least one treaty partially breaking the North-American success pattern in this respect, see the Canada–China BIT, discussed above.

transparency is obvious. At the time of writing, Latin-American states (Mexico notwithstanding) have concluded 14 TIAs containing mechanisms for ISDS with non-American parties, all but one²¹⁴ of them concluded after 2004.²¹⁵ Six treaties contain express provisions on procedural transparency. However, in four of these (three of which involve Central-American states and Taiwan) the conditions for the publication of final awards are the only transparency issue regulated.²¹⁶ The fourth, the Republic of Korea–Chile FTA (in force 2004) does, somewhat surprisingly, allow for unilateral publication of final awards.²¹⁷ A mere 2 treaties feature the same type of comprehensive regulation that have seemingly become the standard in continental American investment agreements.²¹⁸ These numbers stand in sharp contrast to the recent inter-American IIAs discussed above, and strongly indicate that the transparency-oriented Latin Americans have met considerable resistance on this point when negotiating outside their region. An alternative explanation may be that there are circumstances surrounding some of these treaties or the investment opportunities that lie beneath them that alter the aims of the negotiating parties with regard to treaty design. If so, there must be present specific conditions relevant to the distinct investment regime that will be established under the treaty, conditions which call for a different approach to transparency than the one generally expressed through inter-American treaties. In the

²¹⁴ The Republic of Korea–Chile FTA was signed 2003, around the time of the Chile–U.S. FTA, and went into force in 2004.

²¹⁵ According to the WTO list of RTAs in force.

²¹⁶ See the El Salvador and Honduras–Taiwan FTA (in force 2008), Guatemala–Taiwan FTA (2006), Panama–Taiwan (in force 2004), all three of which makes publication of final awards conditional upon party consent, cf. Articles 10.39 (4), 10.38 (4) and 10.38 (4), respectively.

²¹⁷ None of Korea’s other TIA examined herein contain similar provisions, with the exception of its FTA with the U.S. Interestingly, the treaty with Chile is the earliest of Korea’s FTA, and it’s relative openness may be an expression of a policy that was later changed.

²¹⁸ Australia–Chile FTA (in force 2009), Articles 10.20 (2) (with regard to *amicus* submissions) and 10.22, Nicaragua–Taiwan (in force 2008) Articles 10.20 (2) (with regard to *amicus* submissions) and 10.21. That the latter treaty provides extensive transparency is somewhat surprising in light of the other Taiwanese treaties with Central-American countries, which only set down conditions for publication of final awards.

present context, in order to constitute relevant arguments against transparent dispute settlement, the conditions and considerations in question must benefit from lack of transparency. It would, however, go beyond the scope of the present study to pursue these questions in detail. Whatever the underlying reasons may be, what is clear is the consistent absence of extensive transparency regulation in most treaties between Latin-American states and states from other regions. And there is no other reasonable explanation why these countries would diverge from what has been a fairly consistent treaty practice than the specific context and circumstances of these diverging treaties.

To illustrate the pattern outlined in the preceding paragraph, one may consider for instance the treaties of Peru. Peru has per date concluded 11 FTAs, five of which are with countries from outside the Americas.²¹⁹ None of these 5 treaties contain any express regulation of transparency in investment disputes, and as such exhibit a significantly different approach compared to the six Peruvian treaties with American counterparts, treaties which were concluded in the same period of time. Peru's 4 BITs from the years after 2004 conforms to this pattern.²²⁰ Colombia, on the other hand, has only concluded one FTA with non-American states, and this treaty, with EFTA (in force 2011), does not provide investor-state dispute settlement. As such, it does not shine light on the present issues. However, when reviewing the 7 Colombian BITs from after 2004, the pattern characterizing Peru's agreements is reaffirmed. Colombia's BIT with Peru is the only one that contains extensive provisions on procedural transparency.²²¹ The others, all with parties from regions other than the Ameri-

²¹⁹ These five are: Peru–Japan FTA (2012) Peru–EFTA FTA (in force 2011), Peru–China FTA (in force 2010), Peru–Republic of Korea FTA (in force 2011), Peru–Singapore FTA (in force 2009). The treaty with EFTA does not offer mechanisms for ISDS.

²²⁰ See Peru–Belgium BIT (2005) and Peru–Japan BIT (2008), none of which feature express provisions on transparency in investment disputes. The Peru–Colombia BIT (2007) and the Peru–Canada BIT (2006), on the other hand, provides procedural transparency of the NAFTA variety.

²²¹ See Articles 25 (2) and 26.

cas, are completely silent on the issue.²²² Chile's TIAs also largely conform to this pattern, exceptions being its treaties with Australia and the Republic of Korea.

The two treaties between Latin-American states and states hailing from other regions that do feature comprehensive provisions on the transparency of arbitral proceedings similar to those usually found in recent BITs and TIAs between exclusively American parties are the Australia–Chile FTA (in force 2009) and the Nicaragua–Taiwan FTA (in force 2008).²²³ In light of the fact that Taiwan's other treaties with the Central-American states demand agreement between the parties for final awards to be published, and are otherwise silent on transparency, it is somewhat surprising that its treaty with Nicaragua establishes full document transparency, especially considering that three of these four treaties were negotiated around the same time. As we recall, by 2008 the Central-American states were already party to the CAFTA-DR, which provides extensive transparency. However, several of the other treaties that were to solidify the regional adherence to transparency in arbitration were yet to be concluded.²²⁴ Against this background, it is likely that procedural transparency was not a high-profile issue in the negotiations of the treaties which ended up without significant provisions on this point. The fact that the Nicaragua–Taiwan FTA provides the same transparency as the CAFTA-DR may indicate that the latter treaty had some influence on the negotiations, or at least that transparency was considered an issue of some significance.

As mentioned at the outset of this section, 6 TIAs between non-American parties contain express transparency regulation. These are the China–New Zealand FTA (in force 2008), the ASEAN–Australia–New Zealand FTA (in force 2010), the Malaysia–New Zealand FTA

²²² See Colombia's BITs with the UK (signed 2010), Japan (signed 2011), India (signed 2009), Switzerland (signed 2006), China (signed 2008), and Spain (signed 2005).

²²³ The relevant provisions are referenced above, *supra* note 240.

²²⁴ E.g., the Colombia–Northern Triangle FTA was concluded in 2007 and went into force in 2009. The Central-American treaties with Taiwan were concluded between 2005 and 2007.

(in force 2010), the India–Malaysia FTA (in force 2011), the Association of Southeastern Nations (“ASEAN”) Comprehensive Investment Agreement (“ACIA”, in force 2012) and Common Market for Eastern and Southern Africa (“COMESA”) Investment Agreement (in force 2007). Notwithstanding the COMESA Investment Agreement, which will be commented on below, these treaties all give *the disputing state* the authority to make publicly available tribunal decisions and awards, subject to the protection of confidential information.²²⁵ With regard to the FTA between Malaysia and New Zealand the authority to make materials public also encompasses the state party’s own written submissions.²²⁶ With regard to the China–New Zealand FTA, the discretion extends to all procedural documents.²²⁷ The issues of *amicus curiae* submissions and public access to hearings are not regulated in any of the 5 treaties.²²⁸

With regard to procedural transparency, these 5 treaties exhibit a state-centered approach, which is interesting. Rather than establishing document transparency as default, they instead vest the authority to disclose in the disputing states.²²⁹ On the one hand, these treaties, by providing for a choice rather than a duty to disclose, establish a markedly weaker standard of transparency than comparable American treaties.²³⁰ On the other, in vesting discretionary procedural authority solely in the state party, the treaties influence the balance of power between the disputing parties and between the parties and the tribunal. This may be seen as a departure from the traditional structure of arbitration, which is characterized by an

²²⁵ See ASEAN–Australia–New Zealand FTA Article 26, ACIA Article 39 (1), India–Malaysia FTA Article 10.19 (14), China–New Zealand FTA Article 157, Malaysia–New Zealand Article 10.28.

²²⁶ Cf. Article 10.28 (1).

²²⁷ Cf. Article 157 (1). According to Alvarez, the agreement is “clearly” inspired by the 2004 U.S. Model BIT. See Alvarez (2010) p. 11.

²²⁸ Leng Lim (2013) pp. 55, 62, refers to Asian states opposing amicus submissions in the context of the WTO. A similar opposition may account for the general absence of provisions on *amicus* participation in Asian treaties.

²²⁹ The Canada–China BIT also fits into this category.

²³⁰ Similarly, Liu (2013) p. 72, on the China–New Zealand FTA.

emphasis on agreement on procedural rules and the power of tribunals to direct the procedure in the absence of agreement. Furthermore, it creates a different situation than when treaties provide for mandatory publication, where the duty follows directly from the primary rule itself, i.e. the treaty, with no discretion left to either party.

It is possible to view this state-oriented approach to transparency in arbitration in connection with the “balanced-approach” to investment treaty-making discussed above.²³¹ The provisions indicate a willingness to increase transparency of proceedings, while allowing the state to “keep the hands on the wheel” by having the last word on whether and the extent to which documents shall be available. While the China–New Zealand FTA is the only one among the five treaties which confer on the state a right to publish to all documents, not just decisions and awards, the treaties are nevertheless interesting, especially with regard to India, Malaysia and China, which have generally tended to not including transparency provisions in their TIAs.²³² In light of these treaties, all of them relatively recent, one might expect further developments with regard to transparency of investment disputes in future treaties involving Asian states.

However, apart from the few treaties just accounted for, the non-American TIAs subject to the present study show an almost unilateral lack of regulation increasing the procedural

²³¹ Section 2.3.4. See also, e.g., Alvarez (2010).

²³² Australian openness towards transparency in arbitration is indicated by its FTA with Chile. The Australia–U.S. FTA (2012) does not feature investor-state dispute settlement mechanisms, see Article 11.16. This is in line with Australian policy at the time of conclusion. See Peterson (2011), available at <<http://www.iareporter.com/articles/20110414>> (last accessed 10 January 2014). The Australian position has now been reversed, and according to reports, the recently concluded, but not yet released Australia–Republic of Korea FTA contains mechanisms for investment arbitration. See McDonald and Simmons (2013), available at <<http://www.lexology.com/library/detail.aspx?g=84e9ed1f-9d40-4da7-9fa4-f07ff3e9e0b2>> (last accessed 10 January 2014).. New Zealand’s openness towards transparency is indicated by it being party to three of the six non-American TIAs featuring transparency provisions. I am unaware of any TIAs between New Zealand and Latin-American states, which rules out a test against the American regional tendency.

transparency of investment arbitration. Significant state actors with a high number of concluded TIAs, such as Singapore, Republic of Korea, India, China, Japan and Malaysia, to a great extent avoid express transparency regulation in all or the majority of their investment treaties.²³³ The approach of these states, while confirming the general impression created by the majority of recent BITs, stands in strong contrast to the noted tendency of American states to include comprehensive transparency provisions in their TIAs.²³⁴

The 2007 COMESA Investment Agreement constitutes an interesting outlier among the non-American treaties. The agreement provides for the same comprehensive procedural transparency that we have observed in intra-American states as well as the treaties of the U.Ss and Canada in general.²³⁵ Full document transparency and public hearings, both subject to the protection of confidential information, are granted under the agreement, as is the tribunal's authority to accept *amicus curiae* submissions. This is the only inter-African investment treaty known to this writer that contains comprehensive provisions on the transparency of dispute settlement proceedings. It will be interesting to observe the development of dispute settlement provisions in inter-African investment agreements as such agreements become more widespread.²³⁶

²³³ For example, and indicating a persisting conservatism, the China–Japan–Korea Trilateral Investment Agreement (signed 2012) does not contain any provisions on procedural transparency.

²³⁴ On East Asian RTAs and transparency in trade dispute settlement, see Leng Lim (2013). He points to a traditional position in favour of closed proceedings which serves to shed light on East Asian attitudes towards transparency in investment disputes as well.

²³⁵ Article 28 (4) to (8).

²³⁶ See also the 2012 Southern African Development Community Model BIT, developed in cooperation with the International Institute for Sustainable Development. The model contains provisions establishing the same level of transparency as in the U.S. Model BIT, see Articles 29.15 and 29.17. Available at:<<http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>> (last accessed 9 January 2014).

2.4.4 The Bigger Picture

How does the examined TIAs relate to the examined BITs on the issues at hand? In broad terms, the TIAs subject to examination in the preceding sections confirm the “either-or”-pattern highlighted in presentation of BITs. States tend either to regulate procedural transparency quite extensively, or not at all. Furthermore, I have found that comprehensive transparency regulation is primarily a feature of treaties hailing from the Americas. While this tendency was not apparent in the BITs, it nevertheless confirms the activism of the United States and Canada on the issue, as the proliferation of comprehensive transparency provisions in Latin-American TIAs is clearly a result of these state’s priorities and influence. A consensus seems firmly established.

A few treaties illustrate a middle position, containing variations on the issue of publication of final awards, alternatively all decisions. Mexico treaties, both BITS and TIAs, usually belong in this group, as do Taiwan’s TIAs with the Central-American states. To the extent that these agreements only state that publication is subject to consensus, they are not deserving of much attention. However, some treaties may express interesting approaches. The state-centered provisions of the treaties between Asian and Oceanic states discussed above is perhaps the clearest expression of an alternative approach, choosing a form of transparency that signals willingness towards increasing the transparency of specific documents, but subjecting the matter to the discretion of the disputing state. It will be interesting to follow the development among these states in the future.²³⁷

The regional differences with regard to transparency provisions in TIAs do not immediately support a claim that there are factors inherent to trade agreements which is conducive to the inclusion of transparency regulation and simultaneously absent from BITs. At least by design, the different treaties are highly similar. That the consistent tendency of Latin-American states to provide transparent dispute settlement is expressed primarily in FTAs

²³⁷ The Trans-Pacific Partnership may also prove to be influential in this region, see below.

has more to do with the fact that almost all post-2004 intra-American investment agreements are FTA rather than BITs. The few BITs between American states from the period also tend to include comprehensive transparency provisions, as illustrated by the Peru–Colombia BIT. And in other regions, states usually do not regulate transparency at all, regardless of treaty type.

However, if one raises one’s view, there are interesting parallels between the rise of transparency in investment agreements and the rise of the free trade agreement as TIA. In an environment where FTAs increasingly becomes the chosen vehicle for investment agreements, a more comprehensive approach to the matters at hand may be expected, including more detailed dispute settlement. Considering the context, scope and complexity of FTAs, traditional, “boiler-plate” BITs may not fit to the same degree, given the interrelatedness of the negotiating process. In this respect it is interesting to note that the more developed model agreements of Canada and the United States are parallel to the “FTA as investment agreement”-development which began around the turn of the millennium. The purpose of an FTA is to establish a comprehensive regime, and negotiations include a broad set of interests, and also likely involve a broader set of governmental ministries. In sum, the process leading to the conclusion of a TIA is far more multifaceted and complex than that which traditionally led to the conclusion of a BIT. In this context, the hastened, “photo-op” approach to the conclusion of BITs which allegedly was commonplace,²³⁸ becomes outdated. To the extent that investments are covered under such agreements, this could possibly influence the construction of a treaty’s provisions on investments. However, while the material connection between trade – particularly trade in services – and investments have been noted,²³⁹ it is not immediately clear how this affects the approach to procedural issues in investor-state arbitration. There is no visible mechanism leading to the design of more transparent investment dispute settlement under FTAs. However, it has been proposed that

²³⁸ Maupin (2013) p. 151–152.

²³⁹ Levesque and Newcombe (2013) p. 119.

FTAs are “particularly suited to promoting broader policy objectives over and above a pure trade or investment agenda.”²⁴⁰ Against the background of the U.S. Trade Act of 2002 and its Trade Negotiating Objectives, this seems at least a possible explanation for the increasing frequency of treaty regulation of transparency in dispute settlement. The Trade Act indeed highlights such broader policy objectives, which encompasses, as pointed out, transparency in arbitration.²⁴¹

Against this background, there seems to be some basis for the claim that TIAs and the context in which they are negotiated and concluded at least carry the potential of contributing to more transparent investor-state dispute settlement. However, TIAs as such do not necessarily lead to increased transparency. The decisive point perhaps, is whether there are broader policy objectives at work conducive to increasing transparency. Judged by the body of TIAs reviewed herein, this is not necessarily so.

2.5 Conclusions

In this chapter, I have traced the development and prevalence of procedural transparency standards in IIAs. Against the background of my findings, one may be bold enough to predict a further development in the direction of increased transparency of investment dispute proceedings. The states consistently including comprehensive transparency standards in treaties seem base this practice on a combination of policy and external pressure, the exceptions being Canada and the United States, which, having been at the vanguard on the issues since the beginning, have been the ones applying the pressure. On the other hand, states which consistently do not include transparency provisions in their treaties often seem to be fastened in an investment treaty paradigm which do not have room for more sophisticated procedural design. Only certain states seem to more actively avoiding transparency regulation or express idiosyncratic approaches to the issue. [xxx pull back to NAFTA?]

²⁴⁰ Ibid. p. 132.

²⁴¹ Trade Act of 2002, Pub. L. 107–210, 116 Stat. 933 sec. 2102(a)-(c).

As the next chapter turns to assess the transparency regulations of central arbitral regimes applicable to investment disputes, the significance of express regulation of procedural transparency at the treaty level will be made clear. The two-level dynamic leads to procedural rules filling the vacuum left by treaties which do not regulate the issues. And when such issues arise during proceedings, they are out of the exclusive domains of the states. The context is changed. In contrast, at the level of state-state negotiation, the parties have the opportunity of fine-tuning procedural matters, with binding force upon both parties and tribunals. However, relatively few states take advantage of this opportunity.

Finally, a small look towards the future. Based on the way the United States consistently have succeeded in including transparency provisions in its treaties, it is likely that the Trans-Pacific Partnership (TPP) and its European sibling Transatlantic Trade and Investment Partnership (“TTIP”), if eventually finalized and adopted, will contain the same transparency provisions as other post 2004 US TIAs.²⁴² If so, the dispute settlement mechanisms of two of the most prominent IIAs at work will provide for substantial transparency. Among the parties to the TPP are several states which have not previously committed to comprehensive transparency of the American fashion in their IIAs.²⁴³ However, as there is a substantial overlap in the global body of investment agreements, an investor from a member country wishing to initiate proceedings against another member state in many cases will have recourse to this under other treaties. Nevertheless, the inclusion of transparency provisions in line with the U.S. Model BIT in these two treaties would be a significant leap forward. There is also reason to expect the EU to take a position in favor of transparency of investor-state dispute settlement. After the EU assumed competence for foreign

²⁴² With regard to the TPP, the Office of the U.S. Trade Representative has stated that the agreement will provide for “transparent investor-State dispute settlement”. See <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement> (last accessed 13 Januar 2014).

²⁴³ E.g., Singapore and Malaysia.

direct investment under the Treaty of Lisbon,²⁴⁴ the European Commission has signaled an attitude in favour of increasing the transparency of the system.²⁴⁵

3 Transparency Rules in Various Arbitration Rules

3.1 Introduction

In investment arbitration proceedings, to the extent that the IIA providing the legal basis for the dispute, and constituting the primary rules of procedure, do not regulate transparency, the applicable arbitration rules will provide the basis for resolving any such issues. The majority of IIAs currently in force do not expressly touch upon transparency issues. Consequently, one must turn to the applicable rules when searching for solutions to transparency issues in individual arbitration proceedings. It is something of a paradox, then, that the different institutional and arbitral rules available to disputing parties traditionally have been sparse on issues of procedural transparency, mostly leaving such questions to the discretion of the parties, or, in the absence of agreement, to the tribunal. In this chapter, I will present the essential transparency regulation, or lack thereof, of key arbitration regimes.²⁴⁶ Furthermore, I will address how individual tribunals operating under different arbitration rules have handled transparency issues where these are not resolved by the rules. Despite the absence of any binding rule of precedent in investment arbitration, certain tendencies have developed on the subject of procedural transparency in recent years, especially with regard to document transparency. In the following, these developments, as well as related awards and decisions, will be addressed under the relevant headings.

²⁴⁴ Dolzer and Schreuer (2012) p. 11.

²⁴⁵ See “Why is the EU including Investor to State Dispute Settlement in the TTIP?”, available at: <http://ec.europa.eu/trade/policy/in-focus/ttip/questions-and-answers/> (last accessed 13 January 2013).

²⁴⁶ In presenting the distinct regimes, I will keep separate discussion of the UNCITRAL rules and discussion of the newly adopted UNCITRAL Transparency Rules, as the application of the former does not necessitate the application of the latter. Furthermore, any case law under the new rules is yet to surface. The UNCITRAL Transparency Rules will receive separate treatment in section 3.7.

In practical terms, questions pertaining to transparency and confidentiality in arbitral proceedings primarily concern the extent to which the different sets of rules establish specific solutions with regard to the transparency of different aspects of the proceedings. Furthermore, to what extent do the disputing parties if they so wish have access to agree on diverging solutions? And in the absence of express provisions in the applicable rules or the treaty framework, how do tribunals go about exercising their discretionary powers when issues arise during proceedings? On what grounds do they base their decisions?

When addressing the scope and exercise of tribunal discretion on issues of transparency, it is important to keep in mind the specific characteristics of investment arbitration. While the procedural rules applied are modeled primarily on private commercial arbitration, its subject matter – the review of sovereign acts by the state affecting investors – is of a public or administrative law character.²⁴⁷ Yet again, the system’s primary legal basis – investment treaties and customary international law – is based in public international law.²⁴⁸ How do these diverging characteristics frame and possibly limit tribunals’ approach on questions of procedural transparency?

In the following, I will structure the presentation according to the different transparency issues, or categories, as they have usually crystallized in arbitration rules, treaties, case law and scholarly commentary.²⁴⁹ I will adopt a perspective corresponding with the typical progression of proceedings, starting with the issues and rules concerning the commencement of investment disputes. I will then go on to discuss document transparency in general, before taking on questions pertaining to public access to hearings as well as the relationship

²⁴⁷ Roberts (2013) pp. 45–46, 50; Brown (2010) p. 659–660. By describing investment arbitration as such, I do not intend to express a particular view on whether the system is best characterized as a “hybrid” or “global administrative law” regime, or whether the two approaches can peacefully co-exist. On these positions, see, e.g., Douglas (2003); Van Harten and Loughlin (2006), respectively.

²⁴⁸ Roberts (2013), p. 45.

²⁴⁹ As indicated in section 1.2.

between *amicus curiae* and document transparency. I will go on to briefly address rules concerning the publication of final awards. Finally, I will present the newly adopted UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. Note however, that the primary focus will be on, on the one hand, issues pertaining to document transparency, as this is where one has observed the exercise of procedural discretion at its most pronounced, and on the other hand, access to hearings, as this issue illustrates how the applicable rules restrict the power of tribunals to adapt proceedings to the context of investment disputes.

3.2 Registration of the Initiation of Arbitral Proceedings

3.2.1 The topic

To the public at large, generally available information on the initiation of investment arbitration proceedings will usually be the only way of getting to know that an investment dispute has been submitted to arbitration. And because knowledge concerning the existence of ongoing arbitrations is, obviously, a prerequisite for all kinds of non-party activity in relation to the proceedings, it being public attendance at hearings, the preparation and submission of third-party briefs or just general search for information, public scrutiny and debate, mechanisms providing for the dissemination of information on active arbitrations, on as early a stage as possible, become an important device for increasing the transparency of investment arbitration. Arrangements for the registration of the initiation of proceedings will constitute a valuable source of information about the factual and legal matter of the dispute, as well as information on the claimant, the investment in question, legal counsel and more.

For organizational and administrative purposes, any arbitration institution will have to maintain internal registries containing information on pending and past arbitral proceedings conducted under the respective institution. However, from a general transparency perspective, such registries are relevant only to the extent that the information they contain are available to the public at large.

The following section presents the ICISD rules governing registration of information concerning the initiation of arbitral proceedings and related issues. None of the other applicable rules subject to this study provide any kind of transparent registry services.²⁵⁰ To the extent that they are even equipped to make information available to the public, all disclosure and publicly available information are determined by the parties. These arbitral frameworks will therefore not be the subject of any further discussion on this issue.

3.2.2 The ICSID Register as Transparency Instrument

According to the ICSID Convention Article 36 (3), requests for arbitration shall be registered by the Secretary General, unless he finds that the dispute is manifestly outside the jurisdiction of ICSID. While the purpose of (3) is to clarify when ICSID shall reject a request for arbitration, it also indicates the practice of registering any dispute brought under the Convention. Indeed, as fleshed out by the ICSID Administrative and Financial Regulations, regulation 22 and 23, “[t]he Secretary General shall appropriately publish information about the operation of the Centre, including the registration of all requests for (...) arbitration and in due course an indication of the date and method of the termination of each proceeding.”²⁵¹ The registers shall be “open for inspection by any person”, i.e. public.²⁵² The public character of the ICSID case register, providing a basis for a comprehensive overview over ICSID arbitration proceedings, is the one feature that sets the center distinctly apart from other arbitration regimes with regard to transparency.

²⁵⁰ These are the PCA, LCIA, SCC, ICC. With regard to UNCITRAL, this is unsurprising, given that these rules constitute a purely normative and not an institutional framework, and as such is concerned exclusively with the arbitral procedure in isolation. The other frameworks, however, do provide administrative services, and as such are equipped to make information publicly available. However, as stated, in the absence of party consent, they do not.

²⁵¹ ICSID Administrative and Financial Regulation 22 (1).

²⁵² ICSID Administrative and Financial Regulation 23 (2).

The registration of requests for arbitration includes specific information pertaining to the dispute, such as the date of registration, the identity of the parties to the dispute and a brief description of subject matter of the case.²⁵³ In addition, “all significant data concerning the institution, conduct and disposition of each proceeding” shall be registered.²⁵⁴ This includes the identity of the arbitrators in every case. This basic information is listed in the register under each individual case, and may be accessed through the website of the center.²⁵⁵ To the extent that the register includes the actual notices of arbitration,²⁵⁶ these will normally contain relatively extensive information on individual disputes.²⁵⁷ However, the register is not available online in its entirety, and one will not find copies of notices of arbitration on the publicly accessible part of the ICSID website. The Secretariat does provide access to the full database upon request.²⁵⁸ This role of the Secretariat as “doorkeeper” follows from Regulation 23, paragraph 2, which in addition to providing for the general openness of the register, states that “[t]he Secretary-General shall promulgate rules concerning access to the Registers, and a schedule of charges for the provision of certified and uncertified extracts therefrom”. Thus, despite the formal openness of the registry, the actual access to information necessitates some effort (with regard to time and finances) of the information seeker, which may affect the extent to which the register is consulted.

In addition to operating open registers, ICSID routinely publish information and news concerning its operations, including information on ongoing arbitral proceedings, on its website. Note, however, that information pertaining to pending cases is restricted to the pro-

²⁵³ Tams and Asteriti (2010) p. 790; Yannaca-Small (2005) p. 3.

²⁵⁴ ICSID Administrative and Financial Regulation 23 (1)..

²⁵⁵ <<https://icsid.worldbank.org/ICSID/FrontServlet>> (last accessed 4 November 2013).

²⁵⁶ That notices of arbitration are to be included in the register does not follow expressly from the Administrative and Financial Regulations, regulation 22 and 23, but the practice is that these are included, see Delaney and Magraw (2008) p. 731.

²⁵⁷ See, e.g., *Teco Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Notice of Arbitration, 20 October 2010.

²⁵⁸ Delaney and Magraw (2008) p. 731.

gress of the proceedings. In-depth information concerning the substantial contents of the arbitration proceedings, i.e. filings, evidence etc. is not provided by ICSID.²⁵⁹

Taken together, the practices established in accordance with the Administrative and Financial Regulations, regulation 22 and 23, secure a relatively high degree of transparency with regard to information pertaining to the initiation and procedural advancement of arbitrations under ICSID.

In general, the rules of the ICSID Convention do not apply to proceedings under ICSID Additional Facility as the Additional Facility is not part of the Convention.²⁶⁰ However, according to the Additional Facility Rules, Article 5, the Administrative and Financial Rules concerning registration of disputes do apply. Consequently, the above applies to arbitration initiated under ICSID Additional Facility as well.

3.3 Procedural Documents and Transparency²⁶¹

3.3.1 Introduction

Document transparency concerns access to or disclosure of documents generated during arbitral proceedings. Procedural documents typically comprise all documents issued to or from a tribunal during the proceedings, including the different formal procedural documents, such as notices of arbitration, memorials and responses, pleadings, evidence, tribunal decisions and orders, correspondence between the tribunal and the parties as well as minutes and transcripts of hearings.²⁶² In contrast, disclosure of information concerning the

²⁵⁹ Access to this information is rather a matter of document transparency, discussed below.

²⁶⁰ Additional Facility Rules, Article 3. See Schreuer (2009) p. 27.

²⁶¹ Publication of final awards, while strictly speaking a subcategory of document transparency, is governed by different rules and will be discussed separately, see below section 3.6

²⁶² See the US Model BIT, Article 29 (1), *litra* a-e for a comprehensive listing of the basic procedural documents. Also *Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-third Session*,

dispute and the proceedings does not necessarily include disclosure of physical documents. However, the question of confidentiality obligations does not itself differentiate between disclosure of mere information, typically by way of public discussion, and disclosure of actual documents. The two categories are closely connected and, with regard to the extent of potential confidentiality obligations, will often be subject to similar arguments. Depending on the circumstances of individual cases, tribunals may deal with the one issue without the other, while not necessarily making a distinction between the two categories. However, as we shall see, in deciding on the specific transparency of a given proceeding, tribunals often make orders on both document transparency and the access of the parties to publicly discuss the case. It is therefore appropriate to address the two issues under the common heading of document transparency.

The only institutional or ad-hoc arbitration rules subject to this study which provide express rules on the parties' confidentiality obligations are Article 30 of the LCIA Rules and Article 46 of the SCC.²⁶³ The former places strict confidentiality obligations on both parties and tribunal, while the latter provides that "[u]nless otherwise agreed by the parties, the SCC and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award". The wording of the SCC rule do not place obligations directly on the parties, but nevertheless implies that SCC Tribunals if necessary will order parties to respect the confidentiality of the proceedings.²⁶⁴ Consequently, the parties have at least no general right to

(Vienna, 4-8 October 2010), UNCITRAL 44th Session, UN Doc A/CN.9/712, pp. 11–12 (2010) for an overview over different categories of procedural documents.

²⁶³ Tribunals, on the other hand, are generally bound by confidentiality, see e.g., ICSID Arbitration Rule 6 (2) and 15.

²⁶⁴ Born and Shenkman (2009) p. 17; Ortino seem to take the opposite position with regard to parties' access to disclose awards, see Ortino (2013) p. 124.

release documents under these regimes.²⁶⁵ In contrast, ICSID, ICSID Additional Facility, UNCITRAL, ICC and PCA rules do not provide express provisions on the access of the parties to make procedural documents available to the public.²⁶⁶ The absence of express rules is the primary difference between the issue of access to hearings and the issue of access to make documents and information publicly available, as absence of rules opens up room for unilateral party action as well as tribunal discretion on the matters.

As a consequence of the lack of express rules, the question of a presumption or general principle with regards to transparency or confidentiality in arbitration proceedings has been a recurring issue in investment law discourse. In commercial arbitration a presumption of “implied” confidentiality has traditionally been considered the norm, though in recent times there has been increasing debate on the topic, and whether or not such an implied obligation does in fact exist is not clear.²⁶⁷ Initially, as a consequence of modeling investment arbitration on the already established system of commercial arbitration, many argued that a similar presumption applied to the investment arbitration system.²⁶⁸ However, setting aside the separate development in commercial arbitration, commentators and investment tribunals have increasingly recognized that the characteristics of investor-state disputes raise transparency issues specific to that particular field, and consequently requires its own solutions.²⁶⁹

²⁶⁵ It is assumed that treaty-based investment disputes are rarely brought before SCC and LCIA tribunals, as indicated by the low number of treaties providing these regimes as mechanisms for dispute settlement, see section 2.3.

²⁶⁶ With the exception of provisions regulating conditions for the publication of final awards, subject to separate treatment below.

²⁶⁷ See Sarles (2002) pp. 1-2; Haugeneder, p. 1; Born and Shenkman (2009) p. 7.

²⁶⁸ Tams and Asteriti (2010) p. 789.

²⁶⁹ E.g., *ibid* p. 791–792.

When addressing the related issues of confidentiality and transparency in investment arbitration it may be useful to approach the two as values that need to be sufficiently upheld. In the words of *Feliciano*:

“Confidentiality and transparency are both values in international arbitration. They are, however, *competing* values which need to be accommodated and adjusted one to the other in specific cases. A constant or fixed amount of both values in each and every case is probably not necessary. The line of actual contact and equilibrium between the two desiderata is a moving one, and its particular location and shape are function of differing factors. Some of these factors include the kind of international arbitration proceeding involved as well as the nature of the subject matter of the dispute.”²⁷⁰

In short, the competing values should be properly balanced with due regard to the circumstances of the individual case. But how to strike the balance? When tribunals are confronted with having to decide on the appropriate confidentiality measures of a given proceeding, how do they approach the issue, and on what grounds do they make their decision? When addressing these questions, the conflicting legal characteristics of investment arbitration come into play. Does the public law character of investment disputes affect tribunals’ exercise of its procedural powers? Does the public international law character of the treaties? If “[i]nvestment arbitration is in substance a special form of international quasi-judicial review of governmental conduct using as a default the methods of commercial arbitration,”²⁷¹ to what extent and on what basis do investment tribunals adapt those methods when deciding on transparency in the context of investment arbitration?

²⁷⁰ Feliciano (2013) p. 20.

²⁷¹ *International Thunderbird Gaming Corp v Mexico*, NAFTA (UNCITRAL), Award, 26 January 2006, Separate Opinion of Thomas Wälde, paragraph 129.

In the following, I will address how investment tribunals have approached the issue of document transparency. I will start by presenting case law on the existence of any general notion of confidentiality or transparency in investment arbitration. I will continue to analyze the approach of a few significant tribunals when deciding on the proper level of transparency in specific cases.

3.3.2 No General Restrictions on Disclosure of Documents

Against the background of the above, investment tribunals' approach to document confidentiality may be addressed. From a relatively early stage, investment tribunals have had to decide on questions concerning the confidentiality of arbitral proceedings. As early as 1983, the ICSID Tribunal in *Amco v. Indonesia* took issue with the notion of "a spirit of confidentiality" as fundamental feature of investment arbitration, declaring that "the Convention and the Rules do not prevent the parties from revealing their case".²⁷² The statement amounts to a rejection of a general principle of confidentiality in investment arbitration, a view that has been reaffirmed and corroborated by several later tribunals. In the context of the NAFTA, in 1997 the Tribunal in the *Metalclad* case, conducted according to ICSID Additional Facility Rules, similarly rejected the notion of confidentiality of proceedings. The Tribunal asserted that

"[n]either the NAFTA nor the ICSID (Additional Facility) Rules contain any express restriction on the freedom of the parties in this respect. Though it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such a limitation, each of them is still free to speak publicly of the arbitration."²⁷³

²⁷² *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Provisional Measures, 9 December 1983, paragraph 4.

²⁷³ *Metalclad*, Decision on a Request, paragraph 9. Also *Loewen*, Decision on Hearing, paragraph 26.

Following *Metalclad*, a number of tribunals have expressed similar views. For example, the Chapter 11 Tribunal in *S.D. Myers*, established under UNCITRAL, stated:

“[W]hatever may be the position in private consensual arbitrations between commercial parties, it has not been established that any *general principle* of confidentiality exists in an arbitration such as that currently before this Tribunal. The main argument in favour of confidentiality is founded on a supposed implied term in the arbitration agreement. The present arbitration is taking place pursuant to a provision in an international treaty, not pursuant to an arbitration agreement between the disputing parties.”²⁷⁴

The quoted passage shows the Tribunal clearly delineating against commercial arbitration, emphasizing the specific context of treaty-based arbitration, and denying the existence of any inherent notion of confidentiality in arbitration based on treaty rather than agreement.²⁷⁵

In ICSID arbitrations, the most significant statements concerning confidentiality of proceedings post *Amco* were made by the Tribunal in the *Biwater* case, in Procedural Order No. 3.²⁷⁶ In its deliberation on the issues, the tribunal started out by noting that:

²⁷⁴ *S.D. Myers*, Procedural Order 16, paragraph 8.

²⁷⁵ The Chapter 11 Consolidation Tribunal in *Softwood* noted “a general trend” of procedural transparency; see *Canfor Corp. v. United States of America*, *Terminal Forest Products Ltd. v. United States of America and Tembec Inc. et al. v. United States of America*, NAFTA (UNCITRAL), Order of the Consolidation Tribunal, 7 September 2005, paragraph 139. It is important to keep in mind, however, that after the 2001 FTC Notes of Interpretation of Certain Chapter 11 Provisions, the issue of a fundamental notion of confidentiality in Chapter 11 arbitration is more or less resolved. Transparency problems in Chapter 11 proceedings are now resolved against the background of the FTC statements. For an example of how this plays out in practice, see *Chemtura*, Confidentiality Order, in particular paragraphs 10–14.

²⁷⁶ *Biwater Gauff*, Procedural Order 3. See Knahr and Reinisch (2007) p. 100. In ICSID proceedings, in addition to the *Amco* and *Biwater* Tribunals, several tribunals have noted the lack of any general notion of confi-

“In the absence of any agreement between the parties on this issue, there is no provision imposing a general duty of confidentiality in ICSID arbitration, whether in the ICSID Convention, any of the applicable Rules or otherwise. Equally, however, there is no provision imposing a general rule of transparency or non-confidentiality in any of these sources.”²⁷⁷

Having established this, the Tribunal identified what it saw as “an overall trend in this field towards transparency”,²⁷⁸ and referred to similar reasoning in relevant previous investment tribunal practice under ICSID, UNICTRAL and NAFTA, specifically highlighting the abovementioned decisions in the *Amco*, *Metalclad*, *S.D. Myers* and *Loewen* cases.²⁷⁹ The Tribunal concluded: “These considerations, and the accepted need for greater transparency in this field, generally militate against the type of provisional measures for which the Claimant now contends.”²⁸⁰

In the years following the confidentiality ruling in *Biwater Gauff*, several investment tribunals have noted not only the lack of a general obligation towards confidentiality, but indeed a tendency or trend towards transparency.²⁸¹

confidentiality in the applicable rules, see, e.g. *World Duty Free v. Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, paragraph 16; *Churchill*, Procedural Order 3, paragraph 46; *Abaclat*, Procedural Order 3, paragraph 67; *Telefónica S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/12/4, Procedural Order No. 1, 4 July 2013 (hereinafter “*Telefónica*, Procedural Order 1”), paragraph 17.6.

²⁷⁷ *Biwater*, Procedural Order 3, paragraph 121.

²⁷⁸ *Ibid*, paragraph 122.

²⁷⁹ *Ibid*, paragraphs 126–133.

²⁸⁰ *Ibid*, paragraph 133.

²⁸¹ E.g., *Philip Morris*, Procedural Order 5, paragraph 51; *Abaclat*, Procedural Order 3, paragraph 67; *British Caribbean Bank Ltd. v Belize*, PCA Case No. 2010/18, Procedural Order No. 1, 6 September 2010, paragraph 13.

The statements cited in this section indicate an open attitude on the part of tribunals with regard to transparency of proceedings. The legal arguments are based primarily on the absence of explicit rules of confidentiality in the applicable frameworks and, to a degree, a distinction between commercial and investment arbitration is noted. However, there is more to the picture. As far back as the *Amco*-decision, statements regarding the non-confidentiality of investment arbitration in general have been accompanied by “safety mechanisms” or “exceptions”, which once applied have a tendency to dramatically decrease the discretionary authority of the parties to unilaterally provide for transparency in proceedings. The application of these mechanisms will be discussed in the following section.

3.3.3 Specific Confidentiality – Striking the Balance?

No tribunal known to this writer have concluded that there, without express treaty provisions or agreement, can be no restrictions whatsoever on the discretion of the disputing parties with regard to making information and documents pertaining to the dispute publicly available. The aim of the present section is to investigate how tribunals have dealt with the issue of *specific confidentiality*, that is, the balancing of the legitimate grounds for both transparency and confidentiality in individual proceedings and with regard to specific documents. In other words, how do tribunals exercise their procedural discretion in the absence of rules on document transparency in the applicable frameworks? How do they strike the proper balance between transparency and confidentiality of procedural documents?

That there are limits to the discretion of the parties with regard to revealing information on arbitral proceedings were indicated already in *Amco*. After having asserted that no general obligations of confidentiality were imposed upon the parties, the Tribunal made an important addition, stating that “parties to a legal dispute should refrain, in their own interest, to do anything that could aggravate or exacerbate the dispute, thus rendering its solution

possibly more difficult”,²⁸² the implication being that the confidentiality of the proceedings could potentially be subject to protection through provisional measures.²⁸³

Similar statements can be found in several of the decisions featuring broad declarations on the confidentiality of investment arbitration proceedings. In *Metalclad*, the Tribunal expressed the view that

“it would be of advantage to the orderly unfolding of the arbitral process and conducive to the maintenance of working relations between the parties if during the proceedings they were both to limit public discussion of the case to a minimum, subject only to any externally imposed obligation of disclosure by which either of them may be legally bound.”²⁸⁴

As in *Amco*, the passage implies that if the parties fail to respect these recommendations, the Tribunal may intervene.

In *Biwater*, Procedural Order No. 3, the Tribunal referenced the abovementioned observations of the *Amco*, *Metalclad* and *Loewen* Tribunals concerning the responsibilities of the parties to not to contribute to aggravating or exacerbating the dispute. More importantly, the Tribunal elaborated on the statements of these previous tribunals, as well as on the power and responsibility of tribunals to protect the integrity of the proceedings by directing the parties to refrain from acts endangering the dispute.²⁸⁵ The statements and reasoning of the Tribunal on these points go considerably further than any previous tribunals and have

²⁸² *Amco*, paragraph 5.

²⁸³ Similarly, Knahr and Reinisch (2007) p. 100.

²⁸⁴ *Metalclad*, Decision on a Request, paragraph 10. The Tribunal in *Loewen* subscribed to this statement, see Decision on Hearing, paragraph 26.

²⁸⁵ *Ibid.* paragraphs 135–140.

proven influential on subsequent practice. They therefore deserve to be relayed in some detail.

Following the disclosure by Tanzania, to a third party, of documents pertaining to the dispute, subsequently published on the Internet, Biwater petitioned for an order prohibiting the parties from taking any steps likely to undermine the integrity of the proceedings or exacerbate the dispute, as well as prohibiting the unilateral release of any procedural documents, except for the final award.²⁸⁶ In its reasoning on the matter, the Tribunal started by expressing the following view on the issues at hand and the nature of the competing interests:

“The determination of this application for provisional measures entails a careful balancing between two competing interests: (i) the need for transparency in treaty proceedings such as these, and (ii) the need to protect the procedural integrity of the arbitration.”²⁸⁷

After having discussed the developments with regard to transparency and confidentiality obligations in investment arbitration, the Tribunal fleshed out the concerns of “procedural integrity” and “non-aggravation/non-exacerbation” of the dispute by listing a number of aspects inherent to them, namely the preservation of the Tribunal’s mission and mandate to settle the issues in dispute, the need to protect the order and “proper functioning” of the proceedings, maintain trust, confidence and equality in the relationship between the parties as well as the need to avoid external pressure and “trial by media”.²⁸⁸ It went on to note that the broadcasting of accurate information on a dispute while proceedings are still ongoing, despite being in the public interest, may be difficult to achieve,²⁸⁹ the implication being that procedural integrity concerns stand in the way of such disclosure. The Tribunal then ex-

²⁸⁶ Ibid. paragraph 12–13.

²⁸⁷ Ibid. paragraph 112.

²⁸⁸ Ibid. paragraph 135.

²⁸⁹ Ibid. paragraph 136.

pressed its agreement with the statements of the *Metalclad* and *Loewen* Tribunals on the advantages of limiting public discussion to what is necessary; subject only to externally imposed legal obligations.²⁹⁰ The Tribunal added, however, that the concerns necessitating the protection of the integrity of the proceedings do not extend beyond the conclusion of the arbitration, but simultaneously emphasized the “obvious tension between” transparency and procedural integrity in pending cases.²⁹¹ The passage strongly implies, while not stating outright, that the interests in favour of transparency will trump those supporting confidentiality after the conclusion of the proceedings. This is unsurprising, as contractual or statutory limits on disclosure will normally apply regardless of the arbitral proceedings, and thus provide the necessary protection of confidential information. Danger of aggravation or exacerbation will no longer be a concern. In line with these considerations, the recommended provisional measures provided in the order were limited to the duration of the arbitration.²⁹²

Turning to the specific circumstances of the case, the Tribunal noted that the proceedings had not yet been harmed by the disclosure taking place prior to the petition for provisional measures, but simultaneously made clear its disagreement with the Respondent on manifested actual harm as prerequisite for provisional measures.²⁹³ The Tribunal emphasized its responsibility to “[ensure] that the proceedings will be conducted in the future in a regular, fair and orderly manner ... that potential inhibitions and unfairness do not arise” and to “reduce the risk of future aggravation and exacerbation of the dispute, which necessarily involves probabilities, not certainties.”²⁹⁴ Furthermore, given the considerable interest in the case and the “media campaign” waged by both parties and other actors, the Tribunal declared that there was risk of both harm and aggravation. However, it added that in light

²⁹⁰ Ibid. paragraph 138.

²⁹¹ Ibid. paragraph 140, also 142.

²⁹² Ibid. paragraph 163.

²⁹³ Ibid. paragraph 144–145.

²⁹⁴ Ibid. paragraph 145.

of the “public nature of the dispute and the range of interests that are potentially affected, including interests in transparency and public information ... as far as possible, any restrictions must be carefully and narrowly delimited”.²⁹⁵

Against this background, the Tribunal decided on the particular restrictions to be placed on the different categories of documents. With regard to dissemination of information through general public discussion, the Tribunal concluded that such discussion should not be restricted, as long as it was limited to the extent considered necessary and did not complicate the relationship between the parties or the settling of the dispute.²⁹⁶ Furthermore, no restriction was placed on the publication of a party’s own documents, regardless of whether these documents had been produced in the proceedings following a disclosure exercise, and without prejudice to contractual, statutory or other obligations of confidentiality.²⁹⁷ With regard to decisions, orders and directions,²⁹⁸ the Tribunal took a middle position. It noted that “the presumption should be in favour of allowing the publication”²⁹⁹ of such documents, but nevertheless, considering that the varying nature of these materials could result in publication being inappropriate in specific instances, the Tribunal retained that disclosure was to be subject to prior tribunal permission.³⁰⁰ With regard to transcripts and minutes of hearings, as well as pleadings, written memorials, correspondence, and documents produced in the arbitration by the other party, the Tribunal ordered these documents not to be disclosed to non-parties.³⁰¹ The reasoning differed somewhat with regard to the

²⁹⁵ Ibid, paragraph 146–147.

²⁹⁶ Ibid., paragraph 149.

²⁹⁷ Ibid., paragraph 156.

²⁹⁸ The parties had previously agreed that awards should be published, see *ibid*, paragraph 151.

²⁹⁹ Ibid. paragraph 152.

³⁰⁰ Ibid, paragraph 153.

³⁰¹ Ibid. paragraph 163 (a).

different categories, but in all instances the decisions were based on the several facets of the fundamental concerns of procedural integrity and non-aggravation.³⁰²

Biwater, Procedural Order No. 3 can be, and indeed have been, criticized on a number of levels.³⁰³ While seemingly having due regard both to the interests supporting transparency and those supporting confidentiality, the actual decision place strict restrictions on the access to disclose documents, leaving next to no discretion to the parties. It may well be asked if the Tribunal in its attempts to avoid future harm to the proceedings effectively eliminated any substantial transparency in the proceedings, and that the restrictions thus were hardly “carefully and narrowly delimited”. It has been pointed out that the order “severely curtailed ... Tanzania's ability to increase the transparency of disputes involving the government. At the same time, the tribunal also curtailed meaningful *amicus curiae* participation by inhibiting public knowledge about the issues raised in the dispute.”³⁰⁴ The quoted passage constitutes a double-barrelled critique. On the one hand, it points out that Tanzania could not itself decide on the proper level of public access to information on the dispute by its own population. That the case in question involved significant public interests – the water supply of Tanzania’s capital – adds weight to this critique. On the other hand, the order inhibited third-parties in effectively contributing to the proceedings, through precluding potential *amicus* participants from substantial access to information while the proceedings were still pending.³⁰⁵ The lack of information would likely be to the detriment of the quality of any *amicus* briefs, and potentially deprive the Tribunal of valuable perspectives on the subject matter.

³⁰² Ibid. paragraphs 155, 157–158, 161.

³⁰³ See, e.g., Magraw, Plagakis and Schifano (2008) p. 10.

³⁰⁴ See Bernasconi-Osterwalder (2011) p. 200.

³⁰⁵ This specific issue later became the subject of a separate provisional order. See more on the relationship between access to information and *amicus curiae* participation below in section 3.5.

The virtue of the approach taken by the Biwater Tribunal is that it allows for a flexible approach depending on the circumstances of the individual case.³⁰⁶ In recognizing “a trend” of transparency, and approaching the issue not on the basis of broad and general notions of confidentiality or transparency, but on the basis of the dispute and circumstances at hand, the Tribunal creates a dynamic model which, at least theoretically, seems to be able to properly balance the competing values of confidentiality and transparency. However, the Tribunal’s reliance on the somewhat murky principles of “procedural integrity” and “non-aggravation/exacerbation of the dispute” seems to stand in the way of performing any real balancing act. It remains unclear in which circumstances there will not be “potential” harm to the proceedings? Admittedly, the *Biwater* proceedings had been characterized by something akin to a media campaign, which was a matter of obvious importance to the Tribunal.³⁰⁷ However, the look to future procedural conduct may in itself contain a bias in favour of confidentiality as a fear of future aggravation is likely to concern the tribunal, and make it more prone to order in favour of confidentiality of documents. In disputes involving significant public interests, with the according NGO activity and media attention these cases usually bring, tribunals oriented towards securing procedural integrity may resist increasing the transparency of the proceedings, in spite of the interests involved. Somewhat paradoxically, then, the public interests involved, which on the one hand provides the basic arguments in favour of transparency, on the other constitutes the very danger inclining tribunals to order in favour of confidentiality.

The approach of the *Biwater* tribunal has proven influential on later tribunals. In *Abaclat*, the Tribunal, having expressed its intention of trying “to achieve a solution that balances the general interest for transparency with special interests for confidentiality of certain information and/or documents,”³⁰⁸ nevertheless ended up issuing an order that restricted the

³⁰⁶ Knahr and Reinisch (2007) p. 113.

³⁰⁷ *Biwater*, Procedural Order 3, paragraph 146.

³⁰⁸ *Abaclat*, Procedural Order 3, paragraph 73.

access to disclose anything but orders, decisions and awards,³⁰⁹ as well as the parties' own disclosed documents and exhibits.³¹⁰ Of particular interest are the Tribunal's statements on pleadings and written memorials. According to the tribunal, such materials carry an "inherent risk to give an incorrect impression about the proceedings."³¹¹ Further, an incorrect impression would not only run contrary to public information purposes, it would likely harm the relationship between the parties, i.e. aggravate the dispute.³¹² These statements set a high bar for the publication of pleadings and similar documents expressing a party's arguments. Indeed, by identifying an "inherent risk" of harm to the proceedings upon disclosure of these materials, the Tribunal basically establishes a presumption of confidentiality.³¹³ The Tribunal performed no real assessment of the extent to which publication of pleadings would in fact lead to harm, nor did it discuss arguments in favour of making the pleadings public. This hardly constitutes a balanced approach to the issue.³¹⁴ It is not self-evident why a risk of incorrect public impressions in itself necessarily would constitute danger of exacerbation or aggravation? And the interest of the state in making its positions on the issues known to its public, in more detail than general public discussion (which the Tribunal allowed³¹⁵) was seemingly not addressed. One could object that the access of the parties to publish their own disclosed documents, as well as all decisions, orders and awards, secured a sufficiently balanced relationship between transparency and confidentiality. While there may be some truth in this, the fact remains that the Tribunal's reasoning with regard to the pleadings does not seem to justify why these documents had to be kept confidential. Considering that the Tribunal acknowledged the lack of any general rule of

³⁰⁹ Ibid. paragraphs 88, 94.

³¹⁰ Subject to certain conditions, see *ibid.* paragraph 109–110.

³¹¹ Ibid. paragraph 102.

³¹² Ibid.

³¹³ Similarly, Newcombe (2010).

³¹⁴ Ibid.

³¹⁵ *Abaclat*, Procedural Order 3, paragraph 84–86.

confidentiality in investment disputes and the trend towards transparency,³¹⁶ the lack of evaluation of the “danger” represented by the specific pleadings in the case is even more confounding.

An even more restrictive view was expressed by the *Telefónica* Tribunal, which ordered all documents submitted, all correspondence, and all decisions save the final award (which was to be published according to the Mexico–Spain BIT) to be kept confidential.³¹⁷ The decision, while noting the absence of general rules on confidentiality or transparency, is more or less devoid of any reasoning on the need for transparency in the proceedings. Indeed, as pointed out by the dissenting arbitrator, the decision implies a presumption of confidentiality “applied in a broad and unrestricted manner, without the Tribunal having exercised any form of prior control”.³¹⁸

The Tribunal in *Philip Morris* expressed a somewhat more flexible approach to the issue of document transparency.³¹⁹ It allowed for the publication by the parties all their own filings, including pleadings and submissions, subject to the notification to the other party and eventual redaction.³²⁰ The decision is relatively slim, but the Tribunal made it clear that it built on the lengthy submissions of the parties when making its decision, and emphasized the public interest component of investment disputes as foundation for increasing transparency.³²¹

³¹⁶ Ibid. paragraph 67.

³¹⁷ *Telefónica S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/12/4, Procedural Order No. 1, 8 July 2013, p. 22. The references are to an unofficial English translation available at www.italaw.com (last accessed 12 December 2013).

³¹⁸ see Ricardo Ramírez Hernández, Dissenting Opinion in respect to Procedural Resolution No. 1, p. 24 The references are to an unofficial English translation available at www.italaw.com (last accessed 12 December 2013).

³¹⁹ *Philip Morris*, Procedural Order 5.

³²⁰ Ibid. paragraph 53E. The parties had agreed on the publication of decisions and awards.

³²¹ Ibid. paragraph 48.

Interestingly, Australia had argued by analogy to the practice of Chapter 11 Tribunals, the ICJ, and the International Tribunal for the Law of the Sea to allow for the publication of written submissions. It had further argued that before WTO panels, the parties maintain the right to publish their own submissions.³²² To the extent that the Tribunal built on these analogies, which is not explicitly stated in the decision, but probable in light of its content, this constitutes a clear example of public international law perspectives making an impact on transparency assessments. Such analogies have been largely absent from the other decisions discussed in this section. In any case, the decision to let the parties decide the extent of transparency to be applied to their own filings, as well as the deliberate procedures for the protection of confidential information³²³ is indicative of a far less strict reliance on procedural integrity-arguments than that expressed in other case law, and does seem better able to balance the conflicting values at play. As such, it provides an appealing model for later tribunals.

3.3.4 Conclusion

Despite that most tribunals have exhibited a general sympathy towards the considerations supporting transparency, when it comes to deciding specific cases the same tribunals often appear surprisingly restrictive. Based on the cases examined under the preceding sections, few tribunals are willing to adapt the arbitral procedure to reflect the significant public interest dimension in investment disputes. The general adherence to the value of transparency does to a degree reflect public law perspectives, in the sense that the public interest in the review of state administrative acts is recognized, but this, as we have seen, has rarely been sufficient to outbalance the distinctively arbitral character of the procedural integrity-argument, with its focus on the relationship between the parties and the orderly unfolding of the proceedings. However, the approach taken by the *Philip Morris* Tribunal may signify

³²² Ibid. paragraphs 43, 51.

³²³ Ibid. paragraph 53A-C.

a shift. It should be kept in mind that this case concerns a public health issue and involved the decidedly untrendy tobacco business. However, this aspect is not pronounced in the reasoning of the Tribunal, and its balanced decision seems well fit to be expanded upon.

3.4 Non-party Access to Hearings

3.4.1 The Topic and the Rules

The concept of *privacy* involves the issue of whether arbitration proceedings shall be open to persons other than the parties to the dispute. The issue goes to the heart of the transparency debate in investment law, striking at the well-established notion of the right of the disputing parties to limit access to the physical environment of the dispute settlement process. As we shall see, this latter notion is clearly expressed in the various international arbitration frameworks subject to review in this thesis.

In public law, the public character of judicial proceedings is considered a fundamental principle, intrinsic to proper “rule of law” and the principle of “fair trial”, and an essential part of any reasonably evolved legal society.³²⁴ Public access to the judicial proceedings of the state, i.e. before municipal courts, enables insight into the mechanisms and operation of the law and oversight with the practice and quality of the courts and their decisions, and as such provides a means to secure public trust in the legal system.³²⁵

These principles do not generally apply to traditional arbitration as private dispute settlement. The starting point with regard to public access to hearings is the opposite of that of the public law sphere. Arbitral proceedings are private; there is no right of access to anyone but the parties. Even if an implied notion of general confidentiality in international arbitration may no longer be taken for granted, the privacy of hearings remains a more or less

³²⁴ On public hearings in relation to the principle of “fair trial” in the European Convention on Human Rights, see Kjølbro (2010) p. 438.

³²⁵ Ibid.

undisputed concept,³²⁶ with some commentators highlighting private proceedings as a “uniformly recognized standard” of international arbitration.³²⁷

Against this background the question becomes, is the issue of privacy fundamentally different in the context of investment arbitration? Does the principle of privacy comprise investor-state disputes as well? The answer is, in short, yes. The majority of the arbitration regimes subject to this study do not separate between investment and commercial arbitration on the issue of access to hearings. Indeed, these frameworks do not separate between investor-state disputes and purely private disputes in general. Even though many have argued for the public or administrative law character of investment arbitration,³²⁸ such perspectives are not reflected in the rules. They all contain binding rules on the private nature of the arbitral procedure, affirming the traditional position in commercial arbitration. As expressed by UNCITRAL Arbitration Rules (2010), Article 28 (3): “Hearings shall be in camera unless the parties agree otherwise.”³²⁹ The arbitration rules of the PCA, SCC, ICC and LCIA all contain identical or highly similar provisions.³³⁰ Consequently, tribunals under these rules do not have the authority to conduct public hearings without the consent of the parties or investment treaty provisions providing for public hearings. They have no discretionary authority on the matter. As we shall see, this also applies to the regimes applica-

³²⁶ Caron and Caplan (2013) p. 607. Privacy is of course subject to the common will of the parties.

³²⁷ Bělohávek (2011) p. 30..

³²⁸ See e.g., Kulick (2013); Van Harten (2010); Van Harten and Loughlin (2006).

³²⁹ The 1976-version contains the same rule in Article 25 (4).

³³⁰ Cf. SCC Arbitration Rules, Article 27, (3) ; ICC Arbitration Rules, Article 25, (3) ; PCA Arbitration Rules, Article 28, (3) ; LCIA Arbitration Rules, Article 19 (4). The LCIA rule provides that “[A]ll meetings and hearings shall be in private unless the parties agree otherwise in writing *or the Arbitral Tribunal directs otherwise.*” (My emphasis) A strict interpretation of the words implies that LCIA tribunals have the authority to open up proceedings also in the absence of party consent. However, this would constitute a break with tradition, and stand in contrast to the strict confidentiality provision in the LCIA Rules, Article 30. Nevertheless, one cannot rule out that there could be public interests involved in a dispute which could tempt a tribunal to exercise its discretion under the rule.

ble to investment disputes only, namely ICSID, ICSID Additional Facility. The current rules of these regimes do not significantly expand the authority of tribunals with regard to access to hearings.

3.4.2 ICSID Revision: Attempted Reform?

ICSID and the accompanying Additional Facility provide a differently designed rule on the issue of non-party access to arbitral hearings. Originally, article 32, paragraph 2 of the ICSID Arbitration Rules left to the tribunal to decide the issue of non-party access to hearings, but only “with the consent of the parties”.³³¹ The Additional Facility Arbitration Rules contained the identical rule in article 39, paragraph 2. Thus, despite the somewhat broader discretionary powers bestowed upon tribunals by the provision, ICSID proceedings were effectively subject to the same “*in camera* unless otherwise agreed”-rule as most arbitration regimes.

In 2004, in order to respond to increased demands for transparency in investment arbitration, ICSID initiated a process of revising its arbitration rules.³³² Early on, the proposed revisions included giving ICSID tribunals the authority to conduct open hearings even in the absence of party consent. According to the original proposal, tribunals “[a]fter consultation with the Secretary-General and with the parties as far as possible ... may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings.” To introduce a rule depriving the disputing parties of the final word on the privacy issue would have constituted a significant departure from arbitral tradition. It was perhaps to be expected, then, when the proposal failed to get the necessary majority of votes in the ICSID Administrative Council,³³³ which instead opted for a rule according to which a tri-

³³¹ See ICSID (2005) pp. 10–11.

³³² See ICSID (2004).

³³³ See Tams and Asteriti (2010) p. 794.

bunal may decide to conduct open hearings, but only “unless either party objects”.³³⁴ The same changes were made in the Additional Facility Arbitration Rules, Article 39 (2). The only material difference of note between the original and the revised rules is that instead of the tribunal having to actively seek the consent of the parties, i.e. a duty to act, under the current rules the tribunal may decide to open up hearings on its own, and it is up to the parties to protest the decision. The change is one from a “consent rule” to a “veto rule”.³³⁵ Other than being a kind of encouragement of tribunal discretionary action, in vesting in tribunals the power to single-handedly approach the issue, the revision has no real effect on the balance of power between parties and tribunal, and can hardly be seen as anything but minor. The privacy of the proceedings still lies firmly in the hands of the parties.

3.4.3 Tribunal Practice on Hearings

As a consequence of the strict privacy rules, one has only seen public hearings in investment disputes where the parties have so agreed. The position of tribunals on this point was clearly expressed in relation to ICSID Arbitration Rule 32, paragraph 2, by the ICSID Tribunal in the *Suez-Vivendi*-arbitration:

“Rule 32 (2) is clear that no other persons, except those specifically named in the Rule, may attend hearings unless both Claimants and Respondent affirmatively agree to the attendance of those persons ... Although the Tribunal, as the Petition asserts, does have certain inherent powers with respect to arbitral procedure, it has no authority to exercise such power in opposition to a clear directive in the Arbitration Rules, which both Claimants and Respondent have agreed will govern the issue ... The crucial element of consent by both parties to the dispute is absent in this case.”³³⁶

³³⁴ Arbitration Rule 32, paragraph 2.

³³⁵ Plagakis (2013) p. 90.

³³⁶ See *Suez-Vivendi*, Order on *Amicus*, paragraph 6. The same view was expressed by the tribunal in *Biwater Gauff*, Procedural Order 5, paragraphs 70, 71.

With regard to the corresponding privacy rule in the UNCITRAL Arbitration Rules, Article 28 (3) (Article 25 (4) in the 1976-version of the rules), several tribunals operating under NAFTA Chapter 11 have plainly expressed the same view.³³⁷

In light of the lack of ambiguity in the applicable rules, and the unwillingness of tribunals to attempt to extend their procedural powers through the erosion of the privacy principle, it is very unlikely that investment tribunals will contribute to a general opening up of arbitration proceedings in the near future. This would involve a fundamental redefinition of the way investment tribunals relate to the greater, established system and principles of international arbitration. For the time being, the issue is one for the parties to agree upon, or states to expressly regulate in treaties. As long as a treaty simply refers the issue to the applicable rules, the treaty parties, as such, have no influence in the matter. The issue lies fully with the disputing parties.

However, the rigidity of the current system does not mean that there has been no development with regard to the openness of investment arbitration proceedings.³³⁸ As we recall, since 2004 the NAFTA parties have all committed themselves to consent to public hearings in Chapter 11 arbitrations. Consequently, most Chapter 11 hearings are now open to the public.³³⁹ Open hearings in Chapter 11 proceedings established under ICSID Additional Facility are usually supported by the facilities of ICSID in Washington. Hearings in Chapter 11 proceedings under UNCITRAL rules are usually either supported by ICSID or the

³³⁷ See, e.g., *Methanex*, Decision on *Amici Curiae*, paragraphs 40–42: “The Tribunal must ... apply Article 25 (4); and it has no power (or inclination) to undermine the effect of its terms”. Also *UPS*, Decision re *Amicus*, paragraph 67.

³³⁸ See Plagakis (2013) for a comprehensive treatment of the logistical developments of open hearings in international judicial proceedings, including investment arbitration.

³³⁹ As noted, I have experienced some difficulties in ascertaining the degree of openness of hearings in post-2004 disputes involving Mexico.

offices of the PCA. Where open hearings are agreed upon, it is these institutions in cooperation with the tribunals that provide the necessary logistical arrangements. The latest logistical development is webcasting of arbitral proceedings. Webcasting has significant transparency advantages compared to closed-circuit broadcasting. In popularizing access to hearings, one largely alleviates the abovementioned problems related to the capacity of localities, geographical distance and to a certain degree also socio-economical distance to proceedings. The first investment arbitration featuring webcasted public hearings was the *Pac Rim Cayman LLC v. Republic of El Salvador* case (“*Pac Rim*”), established under ICSID rules on the basis of the CAFTA–DR FTA.³⁴⁰ The hearings took place in May 2010.³⁴¹ In 2011, the procedure was repeated in the *Railroad Development Corporation v. Republic of Guatemala* and *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, both cases taking place within the same treaty and institutional framework as the *Pac Rim* case.³⁴² Furthermore, in November 2013, the hearings in the NAFTA arbitration *Bilcon v. Canada*, conducted according to UNCITRAL rules under the auspices of the PCA, were webcasted from the headquarters of the PCA in The Hague.³⁴³ This is the first PCA administered public webcast in investment arbitration known to this writer.

Outside the context of the NAFTA, CAFTA-DR and other treaties providing for public hearings under which there is available case law, it is unclear how many ICSID arbitrations have featured open hearings.³⁴⁴ Similarly, the relative lack of transparency of the other ar-

³⁴⁰ See CAFTA–DR, Article 10.21 (2), which provides for mandatory public hearings.

³⁴¹ Plagakis (2013) p. 84. See *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12.

³⁴² Plagakis (2013) p. 84; UNCTAD (2012) p. 40. See *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23; *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17.

³⁴³ *Bilcon of Delaware et al v. Government of Canada* (UNCITRAL), PCA Case No. 2009/04. See PCA Press Release, accessible via <http://www.pca-cpa.org/showpage.asp?pag_id=1341> (accessed 21 November 2013).

³⁴⁴ I have not been able to establish the number of open hearings, if any, conducted under ICSID on the basis of treaty regimes not providing for mandatory open hearings.

bitration regimes under review makes it difficult to ascertain the extent to which open hearings have been held. The assumption, considering the tradition of privacy, would be that few proceedings under other regimes have been open to the public.

Against this background, it is difficult to make qualified predictions with regard to whether public hearings will be increasingly common in investment arbitration in the future. As noted above, such a development is not likely to be initiated by tribunals, and the number of treaties providing for mandatory public hearings is relatively low. What then, about the parties themselves? Are there notable pressures and forces currently working upon investors and states that may lead to a change in perspective on privacy in arbitration? The NAFTA-development may indicate that such forces are at work. As noted in section 2.2, the NAFTA does not make public hearings mandatory. Nevertheless, a large number, if not the majority, of Chapter 11 arbitrations have been open since the member states committed themselves to consent to public hearings. This implies that disputing investors, when confronted with forces in favor of transparency, may reach different conclusions than when operating within a climate where privacy of proceedings is taken for granted. This is perhaps no fundamental insight. Nevertheless, it may support increased activity of pro-publicity states and third parties with regard to changing the status quo. If confronted with a multifaceted set of forces in favor of transparency, both internal, i.e. the state party, and external, i.e. interested third parties, the general public, media etc., an investor may conclude that privacy is no longer necessarily in his/her interest. However, such a scenario presupposes a certain level of transparency, e.g. the public registration of the initiation of the dispute, as external pressure is more likely to be present if the existence of the dispute is known to other actors than the parties and the tribunal.

One should not take for granted that all investors will be against opening the physical proceedings. On the contrary, in light of the legitimacy debate and the generally low level of understanding and awareness of investment law among the general populace, one could argue that it is in fact in the interest of both investors and states to allow access to the proceedings, as a way of showing what these types of disputes are really about. Through show-

ing a willingness to shed light on the workings of investment dispute settlement, as well as on the subject matter of the dispute, the disputing parties may in fact strengthen the legitimacy of the system. As such, public hearings could potentially contribute to increased legitimacy in two different, although related, ways. On the one hand, open hearings, in increasing the transparency of the dispute by making it, in principle, accessible by anyone, heightens the legitimacy of the investment arbitration system. On the other hand, increased public knowledge and understanding of investment arbitration and the grounds upon which the system is based, could itself lead to strengthened legitimacy.

3.5 Third-Party Participation and the issue of *Amicus curiae* submissions

3.5.1 The Topic and the Development

Investment disputes fairly often raise public interest issues. For various reasons, these interests are not always brought to the tribunal's attention by the disputing parties. This raises the question of whether non-disputing parties should be allowed to represent such interests and perspectives in arbitral proceedings.³⁴⁵ The discussion of third-party, or *amicus curiae*, participation in investment arbitration has been conducted against the background of this question. It has never been an issue of providing third parties with full legal standing in investment disputes.³⁴⁶ Rather, its primary focus has been the authority of tribunals to accept submissions on factual or legal issues relevant to the cases in question. By now, tribunals' authority to accept such submissions is fairly well-established in both case law and central institutional frameworks, to the extent that "it is almost presumed that investment tribunals have the authority to permit *amici curiae* participation."³⁴⁷ Additionally, most

³⁴⁵ McLachlan, Shore and Weiniger (2007) p. 59–60.

³⁴⁶ This question was dismissed with by the *Methanex* Tribunal. See Decision on Hearing, para 29. Furthermore, petitions for the right to access hearings have consistently been denied by tribunals on the basis of *in camera*-provisions. See e.g. *Methanex*, Decision on Hearing, paragraph 42; *Suez-Vivendi*, Order on *Amicus*, paragraph 6.

³⁴⁷ Bjorklund (2009) p. 1291.

treaty regimes providing comprehensive procedural transparency include provisions on third-party participation. Therefore, I see no need to discuss these developments at length. However, there are remaining issues of interest pertaining to *amicus curiae* in investment arbitration. One such issue is the question of access to information and documents. The primary question of interest here is what limits apply to tribunal authority to release or order the release of documents for this purpose.

A quick recapitulation of the development is appropriate. Initially, the issue of *amicus curiae* participation was not referenced in any of the arbitral rules commonly applicable to investment disputes. Consequently, the question of tribunal authority to allow submissions had to be answered on the basis of the rules concerning the power of tribunals to determine issues of procedure, e.g. UNCITRAL Arbitration Rules (1976), Article 15 (1)³⁴⁸ and ICSID Convention Article 44.³⁴⁹ In 2001, the *Methanex* Tribunal became the first investment tribunal to accept *amicus* submissions.³⁵⁰ Following the *Methanex* decision, the Tribunal in *UPS* reached the same conclusion in October 2001,³⁵¹ and, as we recall, the NAFTA FTC later echoed the two Chapter 11 Tribunals by issuing its Statement of Non-Disputing Party Participation.³⁵² In the context of ICSID, the first Tribunal to assert tribunal authority on *amicus* participation was the *Suez-Vivendi* Tribunal, in May 2005.³⁵³ The revision of the ICSID Rules in 2006 constituted a formal acceptance of the *Suez-Vivendi* Tribunal's decision.³⁵⁴ Both the Arbitration Rules and the Additional Facility Rules now explicitly states that "[a]fter consulting both parties, the Tribunal may allow a person or entity that is not a

³⁴⁸ The corresponding rule in the revised 2010 Rules is Article 17 (1).

³⁴⁹ Bjorklund (2009) pp. 1290–1291, De Brabandere (2011) pp. 15, 17.

³⁵⁰ *Methanex*, Decision on Hearing.

³⁵¹ *UPS*, Decision re Amicus.

³⁵² NAFTA Free Trade Commission, Statement on Non-Disputing Party Participation (7 October 2003).

³⁵³ *Suez-Vivendi*, Order on Amicus.

³⁵⁴ De Brabandere (2011), p. 17.

party to the dispute ... to file a written submission ... regarding a matter within the scope of the dispute.”³⁵⁵

3.5.2 *Amicus* Access to Procedural Documents

In light of the authority of tribunals to accept *amicus* briefs, the question arises whether this authority also extends to make documents available to the public. The issue must be distinguished from the question of whether parties are free to unilaterally disclose procedural documents and information to third parties or the general public.³⁵⁶ With regard to the question of document access for *amicus*, it is rather a question of whether tribunals may order the release of documents to third-parties. The argument in favour of such disclosure is that increased access to information on the dispute and the proceedings is likely to lead to submissions of a higher quality, thus better equipped to be of use to the tribunal.³⁵⁷

As is the case with other questions concerning transparency of procedural documents, the applicable rules are silent. Case law on the matter differs. Tribunals have generally been unwilling to grant document access without party consent, but the grounds on which access have been denied varies. In the *Methanex* decision, the petitioners request for full document access was eventually denied on the grounds of the parties’ confidentiality order, which restricted publication to certain selected documents.³⁵⁸ The Tribunal nonetheless emphasized that “as *amici* has no rights under Chapter 11 of NAFTA to receive any materials

³⁵⁵ ICSID Arbitration Rule 37 (2). The Additional Facility Arbitration Rules, Article 41 (3) contains the identical rule.

³⁵⁶ Discussed above in section 3.3.

³⁵⁷ Bernasconi-Osterwalder (2011) p. 204; Bjorklund (2009) p.1294. Whether the submission “would assist the Tribunal” is one of several points of consideration according to the amended ICSID Rules on *amicus* participation. See Article 37 (2) *littera* (a).

³⁵⁸ *Methanex*, Decision on Hearing, paragraph 46.

generated within the arbitration ... they are to be treated by the Tribunals as any other member of the public.”³⁵⁹ The *UPS* Tribunal expressed the view that

“[u]nder Chapter 11 and the UNCITRAL Rules provision is made for the communication of pleadings, documents and evidence to the other disputing party, the other NAFTA Parties, the Tribunal and the Secretariat – and to no one else.”³⁶⁰

In absence of agreement between the parties sanctioning the release of documents, the Tribunal could have no power under UNCITRAL Rule 15 (1) to provide document access to third parties by a general ruling.³⁶¹ In 2013, the Chapter 11 Tribunal in *Detroit Bridge*,³⁶² when setting out the conditions for the filing of amicus briefs, echoed these older statements by stating that

“[a]micus curiae have no standing in the arbitration, and will have no special access to documents filed in the arbitration, different from any other member of the public. Their briefs must be limited to argument, and may not introduce new evidence.”³⁶³

The 2001 FTC Notes of Interpretation applied in *Detroit Bridge*.³⁶⁴ Consequently, almost all procedural documents would be made available to the public over the course of the dispute. One may ask why the Tribunal felt the need to so clearly express that potential *amici*

³⁵⁹ Ibid.

³⁶⁰ *UPS*, Decision on *Amicus*, paragraph 66.

³⁶¹ Ibid.

³⁶² *Detroit International Bridge Company v. Canada*. NAFTA (UNCITRAL), Procedural Order No. 3, 27 March 2013.

³⁶³ Ibid. paragraph 29.

³⁶⁴ Ibid. paragraph 11. The level of transparency in the proceedings was set out in more detail in an accompanying confidentiality order; see Confidentiality Order, 27 March 2013, especially paragraph 16

would be treated like the general public, especially before any petitions were made. However, the position is not surprising. The statement is fully in line with the view expressed in *UPS* and *Methanex*, as well as, significantly, the recommended procedure set out in the 2003 FTC Statement on *amici*, which states that “[a]ccess to documents by non-disputing parties that file applications under these procedures will be governed by the FTC’s Note of July 31, 2001.”³⁶⁵ It is relatively unsurprising that an egalitarian approach is valued in the transparent NAFTA regime. The solution maintains a strict separation between parties and non-parties with regard to document transparency, which is likely to relieve tribunals and parties from having to relate to specific requests for information from third-parties seeking participation as *amicus*. Simultaneously, the general level of transparency is very high.

In the context of the ICSID, case law on the issue of *amicus*’ rights of document access has been less categorical. The *Suez-Vivendi* Tribunal recognized that the issue raised “difficult and delicate questions because of certain constraints” in the ICSID rules and case law but did not go into detail on the matter as the petitioners in question were not yet accepted as *amici*, and the “purpose in seeking access to the record is to enable a nonparty to act as *amicus curiae* in a meaningful way.”³⁶⁶ Consequently, until *amicus* status was eventually granted, there would be no question of access to documents. However, the last quoted passage seemed to open up the possibility of granting access to documents if this would entail meaningful participation.

The petitioners later applied for and were granted *amicus* status.³⁶⁷ However, they were denied document access on the grounds that they already had sufficient information to meaningfully act as *amici*. This information was attained from sources other than the Tri-

³⁶⁵ NAFTA Free Trade Commission, Statement on Non-Disputing Party Participation (7 October 2003), Section B, paragraph 10.

³⁶⁶ *Suez-Vivendi*, Order on Amicus, paragraph 30–31.

³⁶⁷ *Suez-Vivendi*, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an *amicus curiae* Submission, 12 February 2007.

bunal and the parties, and in addition the Tribunal's decision on jurisdiction had been made available through ICSID.³⁶⁸ In the view of the Tribunal, this was sufficient for the amici "to provide their perspective, expertise and arguments to help the court,"³⁶⁹ No clarification of the general question of a non-party's access to the record was made. At approximately the same time, the *Biwater* Tribunal came to a highly similar conclusion.³⁷⁰

There are two known instances where ICSID tribunals have granted some right of document access to third-parties. The first instance was the *Electrabel v Hungary*³⁷¹ case, in which the European Commission was granted the right to make a submission as well as accessing some documents in accordance with ICSID Arbitration Rules, Article 37 (2).³⁷² The grounds on which the Tribunal based its decision are not known.³⁷³ In the other case, *Foresti v. South Africa*, the Tribunal – on the basis of the Additional Facility Arbitration Rules, Article 41 (3) – expressed its will that "the NDPs [non-disputing parties] must be allowed access to those papers submitted to the Tribunal by the parties that are necessary to enable the NDPs to focus their submissions upon the issues arising in the case and to see what positions the parties have taken on those issues."³⁷⁴ The Tribunal reached its conclusion bearing in mind that "NDP participation is intended to enable NDPs to give useful information and accompanying submissions ... but is not intended to be a mechanism for enabling NDPs to obtain information from the Parties."³⁷⁵ Furthermore, the Tribunal emphasized that "[w]here there is NDP participation, the Tribunal must ensure that it is both

³⁶⁸ Ibid. paragraph 23–25.

³⁶⁹ Ibid. paragraph 25.

³⁷⁰ *Biwater*, Procedural Order 5, 2 February 2007, paragraphs 62–68.

³⁷¹ *Electrabel v Hungary*, (Energy Charter Treaty) ICSID Case No. ARB/07/19.

³⁷² See Peterson (2009).

³⁷³ The only available document does not go into detail on the issue. See *Electrabel v Hungary*, Decision on Jurisdiction, 30 November 2012; Knahr (2011) p. 330–331.

³⁷⁴ *Piero Foresti, Laura de Carli and others v Republic of South Africa*, ICSID Case No ARB(AF)/07/1, Letter Regarding Non-Disputing Parties of 5 October 2009, p. 1.

³⁷⁵ Ibid.

effective and compatible with the rights of the Parties and the fairness and efficiency of the Arbitral process.”³⁷⁶ While brief, the reasoning of the Tribunal operationalizes the guidelines in Additional Facility Arbitration Rule 41 (3) and expands on the previous ICSID practice on the issue.

The decision responds to the criticism that the purpose of amicus participation is undercut if *amici* are not provided with the proper tools to meaningfully participate.³⁷⁷ And the dissemination of relevant information to *amicus* is well in line with the broader issue of securing public interest representation in investment arbitration. However, the decision is viewed less favorably from the perspective of Tribunal obligations of confidentiality in relation to the parties. While there are no rules in the ICSID Additional Facility Rules³⁷⁸ expressly stating that Tribunals cannot make procedural documents public, there is a framework of rules concerning the authority of the ICISD and tribunals to make information and documents publicly available indicating that tribunals should approach the issue of document transparency with caution.³⁷⁹ While tribunals, as pointed out by the *Foresti* Tribunal, should have a view to fulfill the object and purpose of amicus participation as expressed in Additional Facility Arbitration Rule 41 (3) (and ICISD Arbitration Rules 37 (2)), and keep in mind the public interests at play,³⁸⁰ the fact remains that these provisions do not make reference to document access. Therefore, release of documents by tribunals themselves in

³⁷⁶ Ibid.

³⁷⁷ ³⁷⁷ Bernasconi-Osterwalder (2011) p. 204; Bjorklund (2009) p.1294; Knahr (2011) p. 329.

³⁷⁸ Or in the ICSID Convention or Arbitration Rules. Consequently, a tribunal established under the Convention could have reached the same decision.

³⁷⁹ Additional Facility Arbitration Rules, Article 13 establishes the confidentiality obligations of individual arbitrators. Article 23 states that the deliberations of the Tribunal shall remain secret. Administrative and Financial Regulation 22 makes the publication of awards and records of hearings by ICISD subject to party consent.

³⁸⁰ Knahr (2011) p. 329.

the absence of clear rules remains a delicate issue.³⁸¹ While there is no general duty of confidentiality in investment arbitration, the freedom (within limits) to release documents lies with the parties, and if there is danger of publication interfering with the rights of the other party, then the latter may go to the tribunal and ask for the necessary procedural steps to be taken. But when the tribunal itself is releasing or ordering the release of documents to non-parties, there is no recourse to procedural orders or measures. Potentially, the release of documents on the basis of *amicus* provisions in the ICSID framework may thus create an imbalance in the relationship between the parties and the Tribunal. It is not clear how such document release relates to the commandment that submission shall not “burden or unfairly prejudice either party”.³⁸² It should be kept in mind that the *Foresti* case involved highly delicate issues concerning the relation between South African “Black Economic Empowerment” legislation and the conditions for granting of mining licenses. As such, there was a significant public interest in the case, which is likely to have influenced the tribunal. The few known cases in which *amici* have been granted document access indicates that tribunals are still trying to find a comfortable position on the issue.

The parallel development in NAFTA and ICISD arbitration illustrate the interrelatedness of transparency and participation issues. In the context of ICISD arbitration on the basis of treaties which do not regulate procedural transparency, there is a tension between effective *amicus* participation and confidentiality following from the lack of rules on document transparency, which is less acute in the context of the NAFTA, where document transparency on the basis of the 2001 FTC statement has become the rule. In proceedings under the latter regime, third-parties will not have the same need for specific access, as the large majority of procedural documents routinely enter the public domain. In ICISD proceedings, on the other hand, depending on the circumstances and the position of the parties, there may

³⁸¹ Knahr seems to be less concerned, when she expresses the view that “it is within the discretion of tribunals to determine in each individual case which documents should be made accessible to non-disputing parties. See *ibid.*

³⁸² ICSID Arbitration Rule 37 (2); Additional Facility Arbitration Rule 41 (3).

be no more publicly known information than what is publicly registered with ICSID. Granting document access to third-parties participating under *amicus* provisions therefore may secure the level of transparency necessary to facilitate meaningful submissions, which in turn may lead to perspectives on the wider public interests being brought to the attention of tribunals.

3.6 The Issue of Public Access to Final Awards

All the application rules subject to this study contain express rules on the conditions for publication of final awards. UNCITRAL Arbitration Rules (2012), Article 34 (5) expresses the basic principle:

“An award may be made public with the consent of all parties, or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court of other competent authority.”

The PCA Rules contain an identical provision.³⁸³ The LCIA Rules, as we recall, are more severe, placing strict confidentiality obligations upon the parties and tribunals, including confidentiality of awards.³⁸⁴ The SCC Rules place the responsibility with tribunals to “maintain the confidentiality of the arbitration and the award”, unless the parties agree otherwise.³⁸⁵ It is not immediately clear whether this gives tribunals under the SCC the authority to “maintain” confidentiality by prematurely ordering final awards not to be published.³⁸⁶ In any case, it is unclear how and under what circumstances such an authority is to be executed. In the absence of tribunal orders, however, one may assume that the parties

³⁸³ Article 34 (5).

³⁸⁴ Article 30.

³⁸⁵ Article 46.

³⁸⁶ In support of such an interpretation, see Born and Schenkman (2009) p. 17.

may unilaterally disclose an award.³⁸⁷ With regard to IIC Rules, Article 34 (2) forbids a tribunal to release copies of the award to anyone but the parties. Notably, the provision does not address the parties. As such, parties seem to have a “right to transparency” with regard to awards.³⁸⁸

Under the ICSID Convention and the ICSID Additional Facility the parties are considered to have a right to unilaterally disclose final awards, in the absence of agreement to the contrary.³⁸⁹ Many ICISD awards today end up in the public domain by way of the parties.³⁹⁰ On the other hand, the rules do prohibit ICSID from publishing the award without the consent of the parties.³⁹¹ However, ICSID have an unreserved right to publish “excerpts of the legal reasoning of the Tribunal”.³⁹² In a similar fashion, the ICC publishes redacted extracts of selected awards. This practice does not seem to have a specific basis in the rules.³⁹³ Party consent is generally not obtained, but objections are respected.³⁹⁴

Given that the final awards are rendered at the conclusion of the case, procedural decisions explicitly concerning publication of final awards do not occur. Disputes concerning the level of transparency of proceedings rarely concentrate on awards. The issue is usually noted in confidentiality orders, but often only with reference to the applicable rules or eventual agreement between the parties.³⁹⁵ As highlighted by the *Biwater* Tribunal, the tensions be-

³⁸⁷ Ortino (2013) p. 124.

³⁸⁸ Ibid. p. 122.

³⁸⁹ Schreuer (2009) p. 836.

³⁹⁰ Ibid.

³⁹¹ ICSID Convention, Article 48, cf. Arbitration Rule 48 (4); Additional Facility Arbitration Rules, Article 53 (3). If consent is granted, awards are published in accordance with Administrative and Financial Rule 22 (2).

³⁹² Ibid.

³⁹³ Buys (2003) p. 125; Ortino (2013) p. 122.

³⁹⁴ Born and Shenkman (2009) p. 20.

³⁹⁵ See, e.g., *Abaclat*, Procedural Order 3, paragraphs 75, 87.

tween interests in transparency and procedural integrity are significant primarily while proceedings are pending.³⁹⁶ This does not mean that a party may no longer have a legitimate interest in keeping the awards confidential. However, it serves to explain why the issue is rarely put before tribunals. In any case, given that the different applicable rules is interpreted to either give parties a right to unilateral disclosure or establish confidentiality as the rule in absence of contrary agreement, there is no space available for procedural discretion on the matter. Should the issue prematurely arise during proceedings, a tribunal established under rules establishing default confidentiality of awards will have to make an according order. If the tribunal is established under ICSID, or even ICC, there will be no basis on which to base a confidentiality order.

The public availability of final awards raises interesting questions with regard to the development of consistent arbitral practice and the evolution of investment law, as well as broader issues of public interest and transparency. However, it would go beyond the scope of the present study to address these matters.

3.7 UNCITRAL Rules on Transparency in Investor-State Dispute Settlement

In July 2013, after several years in the making, the UNCITRAL Commission adopted the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“UNCITRAL Transparency Rules”).³⁹⁷ The rules, which will be effective as of 1 April 2014, constitute the first example of comprehensive mandatory transparency regulation as part of

³⁹⁶ *Biwater*, Procedural Order 3, paragraph 140.

³⁹⁷ The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, as adopted by the United Nations Commission on International Trade Law (UNCITRAL), 11 July 2013. See United Nations Press release, 12 July 2013: <<http://www.unis.unvienna.org/unis/pressrels/2013/unisl186.html>>. The rules are available at <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf>. The extensive archives of UNCITRAL Working Group II, which developed the rules, are available at: <http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html>.

ad-hoc or institutional rules applicable to investment treaty arbitration. In this section, I will provide an overview of the rules, and briefly address certain perspectives on how they may relate to some of the matters discussed in this study. A thorough analysis of issues pertaining to interpretation and application of the new rules should be the focus of a separate study.

The Rules cover all the essential transparency categories. As the provisions to a large degree mirror similar provisions and arrangements in transparent treaty regimes, a quick enumeration should do. Article 2 cf. Article 8, provides for the prompt publication the name of the disputing parties, the economic sector involved and the treaty providing the basis for the dispute. Article 3 provides for the timely publication of all procedural documents, subject to the redaction of confidential information in accordance with Article 7.³⁹⁸ Respectively, articles 4 and 5 concern submissions by third persons and non-disputing treaty parties. Article 6 provides for public hearings. Article 7 contains grounds and procedures for the designation of information and documents as confidential.³⁹⁹ The rules are mandatory.⁴⁰⁰

Article 7 (6) and (7) is of special interest for the present purposes. According to paragraph (6), information determined to “jeopardise the integrity of the arbitral procedure” in accordance with paragraph (7) shall be exempted from publication. The wording raises the question of how the provision relates to previous case law concerning the “integrity” of the arbitral procedure.⁴⁰¹ If interpreted in line with case law, the provision would stand in danger of undercutting the whole purpose of the rules, by granting tribunals a wide discretionary margin when deciding on transparency. However, according to paragraph (7), there will

³⁹⁸ Article 3 (1)-(4). The provisions makes publication of exhibits and certain uncategorized documents subject to tribunal discretion.

³⁹⁹ Article 7 (1)-(5).

⁴⁰⁰ Article 1 (3).

⁴⁰¹ See case law discussed in section 3.3.3.

only be question of jeopardy to proceedings where publication “could hamper collection of evidence, lead to intimidation” of the different actors or other “exceptional circumstances.”⁴⁰² It will be interesting to see if the narrow concept of procedural integrity expressed in this provision will influence tribunal approaches to the concept of procedural integrity in disputes in which the rules are not applied. If so, confidentiality orders of the *Biwater* variety could in time become exceedingly rare. Such a shift in the view on what constitutes dangers to procedural integrity in the context of investment arbitration would perhaps represent a final acceptance of the public interest in investment disputes as basis for increased transparency of proceedings. However, considering the apparent resistance of tribunals to contribute to increased document transparency in non-transparent treaty regimes, such an effect is perhaps not likely.

According to Article 1 (1), the rules will apply to all UNCITRAL arbitrations based in treaties concluded after 1 April 2014, unless otherwise provided by the treaty. As such, states will have an option to provide for UNCITRAL arbitration in the IIAs without having the Transparency Rules applying to proceedings. With regard to older treaties, i.e. the thousands of IIAs currently in force, the situation is the opposite. Under such treaty regimes, the treaty parties have to agree on the matter in order for the rules to apply.⁴⁰³ Alternatively the disputing parties may agree on their application.⁴⁰⁴ The UNCITRAL Commission has recognized the need for a mechanism for mass-acceptance of the rules, and UNCITRAL Working Group II is currently developing a convention for this purpose.⁴⁰⁵ The danger of forum shopping by investors following increasing application of the Transparency Rules is reduced by Article 1 (9), which provides for their application in investor-state disputes under other rules. Consequently, states may agree on the application of the rules under all dispute settlement mechanisms available under a given treaty.

⁴⁰² Article 7 (7).

⁴⁰³ Article 1(2) litra b.

⁴⁰⁴ Article 1 (3) litra a.

⁴⁰⁵ See Working Group II (2013 p. 3).

4 Concluding Remarks

Some of those calling for the reform of investment arbitration seem to ignore the clear limits on the extent of openness attainable within the system in its traditional form and shape. Although tribunals have contributed significantly to the opening up of investment arbitration at different junctures in time, the frameworks in which they operate have, if not necessarily clear, then at least definite, limits. The final farewell to confidentiality in investment arbitration will not be driven by individual tribunals deciding individual cases. The push will not come from within.

This is especially so in an environment where the large majority of the treaties providing the legal basis of the system are completely silent on issues pertaining to procedural transparency. As we have seen, the significant developments have primarily taken place within the context of specific treaty regimes and, just recently, the framework of the UNCITRAL. This recognition fuels the idea that stakeholders wishing to fundamentally change the mechanisms determining the transparency of the procedure are likely to be more successful if focusing their efforts on reforms at the treaty or institutional level, rather than on attempting to influence tribunal attitudes on the different questions raised by the transparency issue. This is the avenue best suited to provide clear, efficient and predictable rules on the matter.

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United States Model BIT (2012)

Annex 1: U.S. and Canadian Model Investment Agreements

2012 United States Model BIT – Relevant Excerpts

Article 28: Conduct of the Arbitration

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 24(3). If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

2. The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty.

3. The tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party.

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 34.

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the

notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

(b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

(c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 20 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

(d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no

later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

6. When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

7. A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.

8. A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 24. For purposes of this paragraph, an order includes a recommendation.

9. (a) In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties and to the non-disputing

Party. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the expiration of the 60-day comment period.

(b) Subparagraph (a) shall not apply in any arbitration conducted pursuant to this Section for which an appeal has been made available pursuant to paragraph 10.

10. In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 34 should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 29.

Article 29: Transparency of Arbitral Proceedings

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public:

(a) the notice of intent;

(b) the notice of arbitration;

(c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28(2) [Non-Disputing Party submissions] and (3) [Amicus Submissions] and Article 33 [Consolidation];

(d) minutes or transcripts of hearings of the tribunal, where available; and

(e) orders, awards, and decisions of the tribunal.

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 18 [Essential Security Article] or Article 19 [Disclosure of Information Article].

4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

(a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);

(b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;

(c) A disputing party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Party and made public in accordance with paragraph 1; and

(d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information.

5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws

2004 Canadian Model FIPA – Relevant Excerpts:

Article 38: Public Access to Hearings and Documents

1. Hearings held under this Section shall be open to the public. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings in camera.
2. The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the disputing parties.
3. All documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information.
4. Notwithstanding paragraph 3, any Tribunal award under this Section shall be publicly available, subject to the deletion of confidential information.
5. A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in such documents.
6. The Parties may share with officials of their respective federal and sub-national

governments all relevant unredacted documents in the course of dispute settlement under this Agreement, but they shall ensure that those persons protect any confidential information in such documents.

7. As provided under Article 10(4) and (5), the Tribunal shall not require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security.

8. To the extent that a Tribunal's confidentiality order designates information as confidential and a Party's law on access to information requires public access to that information, the Party's law on access to information shall prevail. However, a Party should endeavour to apply its law on access to information so as to protect information designated confidential by the Tribunal.

Article 39

Submissions by a Non-Disputing Party

1. Any non-disputing party that is a person of a Party, or has a significant presence in the territory of a Party, that wishes to file a written submission with a Tribunal (the "applicant") shall apply for leave from the Tribunal to file such a submission, in accordance with Annex C.39. The applicant shall attach the submission to the application.

2. The applicant shall serve the application for leave to file a non-disputing party submission and the submission on all disputing parties and the Tribunal.

3. The Tribunal shall set an appropriate date for the disputing parties to comment on the application for leave to file a non-disputing party submission.

4. In determining whether to grant leave to file a non-disputing party submission, the Tribunal shall consider, among other things, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) the non-disputing party submission would address a matter within the scope of the dispute;

(c) the non-disputing party has a significant interest in the arbitration; and

(d) there is a public interest in the subject-matter of the arbitration.

5. The Tribunal shall ensure that:

(a) any non-disputing party submission does not disrupt the proceedings; and

(b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.

6. The Tribunal shall decide whether to grant leave to file a non-disputing party submission. If leave to file a non-disputing party submission is granted, the Tribunal shall set an appropriate date for the disputing parties to respond in writing to the non-disputing party submission. By that date, the non-disputing Party may, pursuant to Article 34 (Participation by the Non-Disputing Party), address any issues of interpretation of this Agreement presented in the non-disputing party submission.
7. The Tribunal that grants leave to file a non-disputing party submission is not required to address the submission at any point in the arbitration, nor is the non-disputing party that files the submission entitled to make further submissions in the arbitration.
8. Access to hearings and documents by non-disputing parties that file applications under these procedures shall be governed by the provisions pertaining to public access to hearings and documents under Article 38 (Public Access to Hearings and Documents).

Annex C.39

Submissions by Non-Disputing Parties:

1. The application for leave to file a non-disputing party submission shall:
 - (a) be made in writing, dated and signed by the person filing the application, and include the address and other contact details of the applicant;
 - (b) be no longer than 5 typed pages;
 - (c) describe the applicant, including, where relevant, its membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);

- (d) disclose whether the applicant has any affiliation, direct or indirect, with any disputing party;
- (e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission;
- (f) specify the nature of the interest that the applicant has in the arbitration;
- (g) identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission;
- (h) explain, by reference to the factors specified in Article 39(4), why the Tribunal should accept the submission; and
- (i) be made in a language of the arbitration.

2. The submission filed by a non-disputing party shall:

- (a) be dated and signed by the person filing the submission;
- (b) be concise, and in no case longer than 20 typed pages, including any appendices;
- (c) set out a precise statement supporting the applicant's position on the issues; and
- (d) only address matters within the scope of the dispute.

